# The Colonial Executive Prior to the Restoration.

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History is past Politics and Politics are present History.—*Freeman*

# The Colonial Executive Prior to the Restoration

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## PREFACE.

In studying the history of the colonial executive during the period with which this article deals, I have found it necessary to approach the subject from three points of view. In the first place, the various documents, such as charters, commissions and letters of instruction to the governors, have been considered in order to determine the scope and character of the power conferred on the executive officers in the several colonies, the means by which they were limited in the use of the executive prerogative, and the instruments at hand with which to enforce their commands. In other words, executive powers in the various colonies are studied comparatively. Second, the connection between the executive in the colonies and the mother country is examined to see by what means the English administration was carried out; and, finally, the executive is discussed in its relation to the popular assemblies and legislatures as they rose to prominence. It is believed that only by this threefold consideration can the real position of the executive be understood.

I take this opportunity of extending my sincere thanks to all those whose kind assistance, by advice or suggestions, has so materially aided me in the preparation of this paper.

P. L. K.

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# The Colonial Executive Prior to the Restoration.

## CHAPTER I.

### THE ORIGIN AND CHARACTER OF THE EARLY COLONIAL GOVERNMENTS.

To study the early history of the executive in the colonies is to study practically their entire constitutional history, for the executive was about the only branch of government for which the charters provided. To explain this circumstance it is only necessary to refer to the motives which prompted the colonizing movement. The discovery, exploration, and settlement of America, as of other regions opened up during the same epoch, was a part of the great commercial expansion which characterized the States of Western Europe at the close of the Middle Ages. It was primarily an economic movement. In the sixteenth and seventeenth centuries, gold and silver treasures were objects sought after and planned for with the greatest zeal on the part of all European governments, frequently to the neglect and sacrifice of other important interests. It was quite generally believed that in the soil of the newly discovered continent lay an unlimited quantity of these precious metals, which it was only necessary to dig up and transport in order to acquire at a stroke the priceless boon of immense wealth. If proof were needed of this statement it might easily be found in that provision invariably inserted in charters issued at this period, reserving to the king one-fifth of all the gold and silver that might be found, and prescribing strict regulations for all trade to and from the contemplated settlement. Profit from this

trade being the chief object of the undertaking, naturally enough it was made a monopoly, and the grantees were usually directed to repel with all possible force any person attempting to infringe their economic privilege.

From these circumstances it came about that the charters contained very meagre provisions for the formation of governments in the colonies. The end in view was not so much the government of a province as the regulation of a business venture. Hence it was deemed sufficient by the statesmen who drew up the charters to provide carefully for the protection of the personal rights and liberties of those embarking on the expeditions, and to leave the organization of a government, as far as possible, in the hands of the leaders. The functions and organs of government considered necessary and usually specified were almost entirely executive in character. So far as governments were concerned, the charters did little more than set up an executive officer, provide him with subordinates and assistants, and grant him all the powers, of whatever character, requisite to the controlling of a settlement.

English history furnished examples of two methods conferring such powers for such purposes upon subordinate bodies—the corporate and the proprietary. Throughout the latter half of the Middle Ages charters of incorporation containing rights and privileges of government, were granted to towns and cities by both lay and ecclesiastical rulers. Nor were the grantees towns and cities only. Guilds, merchants' associations and trading companies by no means infrequently had governmental rights and jurisdictions extended to them in the same way. No doubt the charters varied greatly in form and substance. But they were all alike in that they transferred from a superior to an inferior body the right to exercise certain prerogatives of sovereignty upon certain conditions and in certain places. And this is precisely what the American colonial charters did. Many of these charters granted to English corporations conferred the same kind of power and made substantially the same provisions for gov-

ernment as the charters of the American colonial companies. Thus, for example, the Masters and Wardens of the Guild of Drapers in London could make "such pains, penalties and punishments, by corporal punishment or fines and amercements * * * as shall seem necessary"—provided their acts were not contrary to the laws of the kingdom of England.[1] These grants did not, it is true, confer full civil or criminal jurisdiction, but when such was needed it was conferred in specific terms.[2] Again, as to the proprietary method, here also the system was well established. Ever since the time of Charles the Great and the system of counts and dukes devised by him for the administration of border districts of his empire, it had been customary to grant large provinces in fief to feudal proprietors with all right of jurisdiction and government, saving nominal allegiance to the sovereign. Such were the great border counties palatine of Chester and Durham, strengthened and granted out since the days of William the Conqueror as a means of defence against the Scots and Welsh. The proprietors of these great fiefs enjoyed all regalian rights. Free from royal taxation and service in parliament, they had a parliamentary system of their own and levied their own taxes. The judiciary and military were entirely at their disposal. It is true that much of this independence was lost under Henry VIII, but the proprietary charters for America were modeled upon what these tenures had been at the time of their greatest jurisdiction, so that Lord Baltimore was able to plead, in support of royal jurisdiction exercised by him, that he possessed all the rights ever enjoyed by the Bishop of Durham before the time of Henry VIII.

Such were the prototypes for the organization of the colonial companies. The English statesmen of the seventeenth century, not foreseeing the different conditions to which dependencies in America would be subjected,

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[1] Brooks Adams: "The Emancipation of Massachusetts," 16.
[2] Brentano: "Guilds and Trade Unions," 36 and 61.

freely used both these methods for the purposes in hand. But men of that age could not be expected to anticipate the rise of an empire from a few insignificant trading posts. Whole kingdoms were granted away and governments for enormous territories lightly created by the turning of a sentence. The set phrase which conferred almost sovereign rights and powers on Gilbert and Raleigh and others in the sixteenth century, appears in substantially the same words in the charters of the seventeenth century. It sums up the matter by conferring on the corporation or proprietor the right to make, order, decree, and enact, constitute, ordain, and appoint all such laws and acts as they think meet.[1]

Whichever of the methods was made use of, the corporate or proprietary, made little difference as to the machinery of government actually enjoyed in the colonies themselves. The powers conferred by the charters upon the corporation or proprietor in England were principally executive in character, in accordance with the customary usage known in England, so, a purely executive government was all that was contemplated for the management of the colonies sent out to America.

The Governor and Treasurer were the chief functionaries of the companies which met in London or Plymouth, while the Lord Governor and Captain General was always preeminently the most important man in the colony. He was a copy, on a small scale, of the king, and was vested with many royal prerogatives.[2] Not merely all executive power was in his hand, but all the functions of government for which the charters provided were subject to his administration. There is hardly a trace of the idea of separation of powers. Excepting the cases of Connecticut and Rhode Island, it may be stated that no specific provision was made for a dis-

[1] "Gilbert's Charter;" Hazard: "Collections," I, 30.

[2] Story, "On the Constitution," I, 138.

tinct legislative body by any of the charters.[1] It was left to the companies and proprietors to supply legislatures, or for the colonists to demand and obtain them as best they might. As has been frequently pointed out, this fact explains the phenomenon that legislatures "grew up" as distinctive American institutions. It is not less true or important that the executive was essentially the English institution of the colonial government. The governor, and frequently all or most of his subordinates, were appointed and commissioned in England, if not by the king by the companies or proprietor resident there. These commissions, together with frequent letters of instruction from the same source, formed as important a body of law for the administration of the colonies as the charters themselves. It was by means of the executive that communication was kept up with England; and whatever authority the home government exercised over the colonies was brought to bear through the same agency. In short, the executive served as the medium of transmission of power and law from England to America.

This fact, that the governor was an English officer supported by the English government, and representing English power, soon placed him in great discredit among the body of the colonists. The colonists were opposed to a strong central government of any character whatever. They were especially hostile toward one whose source lay outside the colony, and very soon began their attempt to reduce it. The conflict between the popular assemblies and the governors developed as soon as the colonies were firmly established, continued throughout their history, and made its influence felt even after they had become independent. When our Federal Constitution was discussed and adopted, one of the chief

[1] By the charter of Pennsylvania the legislative power was vested in the proprietor with freemen or their deputies. But no method was provided for assembling the freemen, the ordinance power was granted to Penn, and he was left to say who were freemen. The same is true of Baltimore's charter.

points of objection to it was the fear that the President would become a tyrant, after the model of the Lord Governor and Captain General in the colonies. The same fear and anxiety was manifested still more effectually in limiting the authority of the executive, provided in the State Constitutions then formed. Recollections of the once odious agents of English oppression, the colonial governors, led the people to carefully remove all means of independent action on the part of their executive. But while the presidency, from the very necessities of the case, has developed into a strong administrative department, the power and importance of the governor has gained only on the political side and has still further declined on the administrative side.[1] How much the governor of to-day differs from the officer who bore that title in the seventeenth century and was vested with practically all functions and powers of government, and how this change has come about, can only be understood by following, consecutively, the development of one into the other. Concerning the origin and development of the legislatures which grew up here, and are claimed as American institutions, much has been written.[2] But the executive which, though not American in origin, formed the most important part of the colonial government, influencing profoundly the development of American institutions into which it has itself been incorporated, has never received adequate or proper treatment.[3]

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[1] Goodnow: "Comparative Administrative Law," I, 62, 80. Schouler: "Constitutional Studies," 156, 267.

[2] Riley: "Colonial Origin of New England Senates." Chandler: "Representation in Virginia." Haynes: "Representation and Suffrage in Massachusetts." Moran: "Rise and Development of the Bicameral System in America." All in Johns Hopkins Studies.

[3] Thus Goodnow, in seeking for the "History of the Executive Power and Authority in America," goes no farther back than the eighteenth century and only devotes six pages to a bare mention of the executive in Massachusetts, Virginia and New York. "Comparative Administrative Law," Book II, chap. 2.

Fisher, in his book on the "Evolution of the Constitution," con-

## CHAPTER II.

## THE CONSTITUTION AND POWERS OF THE EXECUTIVE.

Any constitutional study of the colonies naturally begins with Virginia, the oldest. The charter of 1606 may be taken as a convenient point of departure, for this date marks the beginning of permanent and successful occupation, and there is henceforth no break in the line of historic constitutional development. By the provisions of this charter the king was made the efficient as well as the ultimate source of government for the colony about to be founded. It established a superior council of thirteen persons resident in London, and an inferior council of thirteen in the colony of Virginia.[1] The appointment of these councils was directly controlled by the king. The London Council he appointed personally; the Virginia Council, through his instructions and orders to the London Council.

The superior council in London was given "the superior Managing and Direction, only of and for all Matters that shall or may concern the Government, as well of the said several colonies, as, of and for any other Place or Port,

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fines his work to tracing back through the previous colonial and English documents the various clauses of the Constitution, in order to show that that instrument was neither an invention nor an imitation.

An excellent treatment of the sources of our Constitution is that of C. E. Stephens, in which he shows how our President is an enlarged colonial governor, as the colonial governor was a miniature English king. But it is not a part of Mr. Stephen's work to give even in outline a history of the executive in the colonies.

[1] The charter also provided similarly for a second or Plymouth Company, but no permanent settlement was made by it.

within the aforesaid Precincts."[1] The inferior council in Virginia was to "Govern and order all Matters and Causes, which shall arise, grow, or happen, to or within the said several Colonies, according to such Laws, Ordinances, and Instructions, as shall be in that behalf, given and signed with Our Hand or Sign Manuel." Each council was to have a seal of its own.

These provisions contain all that the charter enacts for the erection of a government. There were no directions as to the mode of organizing the councils or the exercising of their functions.[2]

To determine these points we must go beyond the charter to a body of instructions issued by the king, November 20, 1606, appointing the London Council. Fourteen persons were named in this document, with "Full Power in the name of his Majesty to give Directions to the Councils resident in America for the good Government, and proper disposing of

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[1] Hazard: "Historical Collections of State Papers," I, 53.

[2] In addition, however, to the general grants quoted, certain powers were especially conferred on the company. These may be summed up as follows:

(1) To establish and regulate mines.

(2) To coin money.

(3) To transport colonists and their property.

(4) To repel invasion and defend settlements.

(5) To regulate trade, of which a monopoly was given.

(6) To assign lands to the planters, to be granted under patent of the king.

The first of the above powers was granted to "The said several councils for the said several colonies," and contains the clause, "without any interruption from Us, Our Heirs, or Successors." Grants of the other powers are "unto the said Thomas Gates, Sir G. Somers, Richard Hacluit, Edw. Maria Wingfield and their Associates of the said first Colony and Plantations." This last clause, however, cannot be taken as conferring power on any body outside the councils. No such body was created expressly; it is doubtful if it was intended to create a corporation. On this last point, see H. L. Osgood in "Pol. Sci. Qu.," 1887, XI, 265.

all causes as near as possible in accordance with the Common Laws of England."[1] The king reserved the power of changing this London Council at his pleasure, and of naming the first members of the council for Virginia. This latter council was directed to choose one of its own members president for one year, and was entrusted with the following discretionary power: "And it shall be lawful for the major Part of the said Council, upon any just Cause, either Absence or otherwise, to remove the President, or any other of the Council; and in Case of Death or such Removal, to elect another into the vacant place; provided always, that the Number of each of the Said Councils shall not exceed thirteen." To these instructions from the king for the Virginia Council, the London Council, by an order of December 10, 1606, naming the members of the Virginia Council, added, that the president should have a double vote in case of tie; should take the oath of allegiance before the council and then administer the same to the other members; and should be commander of the forces of the colony.[2]

It will readily be seen that this form of government was in all essential features an absolutism. The king appointed and instructed his council in London. The council in London appointed and instructed the council in Virginia. The actual colonists were not to be consulted and had nothing whatever to say in the government of the colony. Within the colony the only governing body was the president and council. This body was given the ill-advised and arbitrary power of deposing as well as electing its own officers and of expelling members from their seats, a power which gave ample opportunity for the intrigues of the jealous councillors. In the two years that this charter was in operation, two presidents were deposed, three members suspended, and the companies' affairs in the colony thus subjected to the arbitrary management of one or two men. For to this

[1] Stith: "History of Virginia, 37.
[2] This document is given in full in Niell, 4.

council, thus illy organized, was given combined power to make and execute laws and to punish disobedience to them.[1]

Owing to the failure of the Virginia Company to realize the high profits it had hoped for, and to a wide interest in colonial affairs among Englishmen of note, a new charter was obtained for the colony in March, 1609. An important change of policy was made by the grant of this charter. A corporation in England was expressly created, in which was centered the powers formerly exercised by the king and the London Council. By this change the king was eliminated from active participation in the affairs of the colony, and the administration entrusted to a commercial body under the name of "The Treasurer and Company of Adventurers and Planters of the City of London for the First Colony of Virginia." Upon this corporation was conferred all the powers and rights of any corporation in England. Among the several hundred of its members there were eight earls, twenty other peers, and ninety-eight prominent knights and gentlemen. Its government contained only one popular principle. The first members of the council, fifty in number, were named by the king in the charter, and the treasurership was bestowed on Thomas Smith. Thereafter all vacancies were to be filled "out of the Company of the said Adventurers in their Assembly for that purpose." The treasurer was given power to convene assemblies for such election, and councillors so chosen were to take their oath before one of the king's high officers. This council was then given, by the charter, "full Power and Authority * * * to nominate, constitute and confirm all Governors, Officers and Ministers which shall be by them thought

[1] "Power to constitute, make and ordain from time to time, Laws and Ordinances for the better government and Peace of the Colony; provided those ordinances extend not to Life or Member. Said laws and Ordinances to stand until altered or made void by the king or Council of England." "King's Instructions." Nov. 20, 1606. Stith, I, 37. The president and council could hear all suits and punish offences; only crimes for which the penalty was death were to be tried before a jury.

fit or needful for the Government of the Colony or Plantation." Also to "make, ordain, and establish Orders, Laws, Directions, Instructions for the government of the said Colony; * * * and to abrogate or change the same at any time in their own good Discretion."[1] This council was further empowered to admit new members to the corporation. The old president and council in Virginia was, by express command, to be dissolved as soon as the officers appointed by the new council in England should arrive in the colony.

It will be noted that the London Council was given the power of appointing officers for the government of the colony. The charter itself, however, distinctly fixed the powers of such officers when once appointed. It granted them "full and absolute Power and Authority to correct, punish, pardon, govern, and rule," according to the instructions of the London Council, or, in default of such instructions, according to their own discretion, provided such proceedings were in accord with the laws of England.[2] The charter further provided that any principal governor which the London Council might appoint for Virginia, was to be vested with full power to use and exercise "Martial Law in Cases of Rebellion or Mutiny, in as large and ample Manner as our Lieutenants of Counties in their own Realm."[3]

In accordance with the provisions of this charter the London Council, on the 28th of February, 1610, issued a commission to "Sir Thomas West, Knight Lord La Warr, to be principal Governor, Commander and Captain General, both by land and sea, over the said colony."[4] This document is interesting and important as the first commission to a Lord Governor of an English colony in America. It granted to Lord Delaware the full extent of power authorized by the charter, and made his authority supreme over all

[1] Hazard, I, 67. [2] *Ibid.*, 70. [3] *Ibid.*, 71.

[4] This commission was printed for the first time in Alexander Brown's "Genesis of the United States," I, 375.

other officers and commanders in the colony, and was to continue during his lifetime. In case of mutiny or rebellion he could declare martial law; and in all other cases, "rule, punish, pardon, govern," according to instructions, or, in default of instructions, according to his own discretion, by such laws as he with his council might establish. He was given power to choose his own council and all other officers necessary for the government of the colony, except the lieutenant governor, admiral, the vice-admiral, the marshal, and sub-governors of provinces, who were to be appointed by the London Council. Moreover, he was empowered to suspend any officer in the colony and appoint another in his place until a decision could be rendered by the London Council. In case he was compelled to leave the colony he could appoint a deputy to fill his place for one year.

Two points must be noticed in regard to this, the first permanent English government in America. In the first place, there was no attempt at a separation of the legislative or judicial functions from the executive. Ample power was conferred on the governor and his subordinates for all matters. His authority was as extensive as the London Council were able, under the charter, to make it, and the charter allowed him power "full and absolute," except as limited by instructions or the laws of England. In other words, the governor was vested with all powers not denied to him expressly by the charter or the ordinances of the London Council, or implicitly by the statutes of Parliament. The second point to be noted, is that the government in the colony was now centered in one chief with several subordinates, the chief being responsible only to the source of his power in England. This was a decided advance over the former system of a "president and council," with co-ordinate powers and authority to depose its own officers and members. The plan of divided power was tried on several later occasions in other colonies but never worked well.

Under this organization the nature of the administration

would naturally depend very largely upon the character of the person who occupied the post of chief executive. During the next few years the personnel of this office changed frequently. Owing to the ill health of Delaware, he remained in the colony but a few months, and the real direction of the government in Virginia fell to Sir Thomas Gates and Sir Thomas Dale, who acted as deputy governors. Both these men were trained soldiers, a fact which largely explains the character of the laws introduced into the colony by them. Gates was knighted while serving in a campaign against Cadiz, in 1596. Later, he was captain, along with Dale, in a regiment in Holland, from which both men were recalled in order to receive appointments in Virginia. The military law then in force in Holland, which was naturally well known to these officers, determined, under their direction, the nature of the first Virginia code, which placed the colony practically under martial law. This body of laws, first drawn up and introduced by Gates and Delaware, in 1610, was later enlarged and enforced by Dale.[1] Its extreme severity cannot be questioned. It did full justice to the customs of the country and the age from which it was an inheritance. Death was made the penalty for a large number of crimes, some of which were only very trivial offences; and a court martial was the body before which almost every other cause was to be adjudicated.[2] It is the general opinion of historians, however, that such methods were necessary in order to bring the turbulent and lawless

[1] Brown, II, 529.

[2] Peter Force: "Tracts," III; "Articles, Laws and Orders, Divine, Politique and Martial for the Colony in Virginia; first established by Sir Thomas Gates, Knight, Lieutenant General, the twenty-fourth of May, 1610; exemplified and approved by the Right Honorable Sir Thomas West, Knight, Lord Lawair, Lord Governor and Captain General, the twelfth of June, 1610; again exemplified and enlarged by Sir Thomas Dale, Knight, Marshall and Deputy Governor, the twenty-second of June, 1611."

classes in the colony under the control of the governor.[1] Under its judicious application and the forceful administration of Dale, the colony became prosperous and orderly.

The third and last Virginia charter was granted in 1612. Its object was twofold: to include the Bermuda Islands within the territory of Virginia, and to confer a wider scope of power on the corporation. But it is significant here chiefly for the radical change it made in the organization of the London Company. Up to this time the business of the company had been transacted by its council in London; but by the charter of 1612 it was provided that the entire membership of the corporation should have a voice in its government. Matters of minor importance could be dealt with at the weekly meetings, at which the treasurer and nineteen other members of the company were a quorum. But for affairs of greater weight there were to be held each year in London, "four Great and General Courts of the Council and Company of Adventurers for Virginia." These courts were given full power, (1) to choose members of the council, (2) to nominate and appoint all officers for the government within the colony, (3) to make and ordain all laws and ordinances for the government of the colony.

By this measure the appointment and control of the governor and other officers within the colony were taken from the small inner body, the London Council, which had hitherto exercised it, and placed directly in the hands of the larger body, the corporation itself. This change was important. The Virginia Company had now assumed its permanent form. Its meetings became popular and of the greatest significance.[2] The corporation could admit and expel members. Before its dissolution, in 1624, its membership had grown to near one thousand, two hundred of

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[1] Brown, II, 529; Stith, 122; Doyle, 138; Chalmers, 31. It is possible that the law did not apply to the independent classes but only to slaves. See Doyle for this view.

[2] Bancroft, I, 145.

whom frequently assembled at its meetings.[1] Many of the most prominent and liberal members of Parliament were its supporters and took part in its deliberations, which became scenes of animated democratic discussion and debate.[2] It was in these meetings that governors of Virginia were now appointed and instructed. This form of administration was severe, permitting the governors to maintain for several years a reign of martial law, but was, on the whole, efficient, thorough, and productive of permanent good for the colony.[3]

The organization of the government within the colony was not immediately changed by the charter of 1612. There was still no attempt at separation of powers. Though Delaware returned to England in 1610, his commission was not superseded until 1618, Gates, Dale, Yeardley, and Argall holding the office as deputy governors.[4] The administration of Gates and Dale has already been noticed. That of Yeardley contrasted strongly with his predecessors. Yeardley had been president of the council and was left by Dale as deputy when the latter departed for England, in April, 1616. He was superseded by Captain Argall, in May, 1617, but was later twice reappointed to the governorship, which office he always administered with marked ability and justice. Yeardley was by nature upright and merciful, and after the stern rule of Dale and Gates his mild administration was welcomed by the colonists. It was during his first governorship that the first legislative Assembly was called. Many other important advances were made, and the power, population and prosperity of the colony was greatly increased.[5]

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[1] Stith, 276.

[2] Burk, I, 300, Appendix. Among the members of the company we find the names of Edwin Sandys, Sir John Holles, Oliver Cromwell, Sir Dudley Diggs, the Earl of Southampton, Sir John Wolstenholm, Robert, Earl of Warwick, Nicholas Ferrar, George Somers and William, Earl of Pembroke.

[3] Burk, I, 315, Appendix. [4] Stith, 132, 138, 145; Niell, 134.

[5] The Virginia Company, "Virginia Historical Collections," New Series, VII, 5.

But the colony was not always administered with such ability. During his short reign of eighteen months as deputy governor, Captain Argall found opportunity to perpetrate a considerable amount of mischief. He was a relative of Sir Thomas Smith, the treasurer of the London Company, and of a wild and adventurous nature. His first advent into the colony, in 1619, was in charge of a shipload of wine intended for private trade with the inhabitants, contrary to the regulations of the company. His administration was marked by the same disregard for law. After his appointment, it is said, he came to the colony with the direct intent of trafficking in violation of the laws he was to administer. Fortunately, his rule was short; for by his sumptuary laws and his arbitrary judicial rulings he managed to make himself thoroughly odious. After his recall to England, he secretly stole away from the colony before the arrival of his successor. He was brought to account by the council in London, but was shielded by his commercial partner, the Earl of Warwick.[1]

In 1618, however, after the death of Lord Delaware, the London Company reappointed Sir George Yeardley administrator of the colony and issued to him a new commission and instructions as Lord Governor, Commander and Captain General.[2] By these documents important changes were made in the Constitution of Virginia. The first step in the separation of powers was here taken. Governor Yeardley was instructed to hold a General Assembly once a year, "whereat were to be present the Governor and counsell, with two Burgesses from each plantation."[3] Previous to this time the only legislative function that had been exercisable in the colony had been the governor's ordinance

[1] The Virginia Company, 9.

[2] "Calendar of State Papers," Colonial, October 25, 1618.

[3] The entire commission is not known to be in existence. See the "Virginia Magazine of History," II, 57, where extracts are quoted. For an account of the proceedings of the first Assembly, see "Calendar of State Papers," July 30, 1619.

power. But by the creation of a distinct law-making body, the legislative power of the governor was greatly curtailed, though not entirely superseded. The governor and his council were to sit in the Assembly with the burgesses and doubtless had great influence in its deliberations. The Assembly, however, elected their own speaker. As the complete text of the commission has not been preserved, it is not known whether the governor was given the power of the veto.

At the same time that the Assembly was constituted provision was made for the permanent support of the governor. Three thousand acres of land were set aside "in the best and most convenient place in the territory of Jamestown * * * to be the Land and Seat of the Governor of Virginia." [1] The governor's guard, previously assigned to Governor Argall, and fifty other persons, were to be settled on this land as tenants, one-half the profits arising therefrom to belong to the governor. Likewise, one-half the profits arising from the rental of the company's lands was to be employed by the governor for the "entertainment of the said councils of State there residing." [2] This was the earliest provision for the permanent support of a governor in America. Being made at the same time that the Assembly was established, it is an indication that the executive officers were not intended to be dependent in any way upon the action of the legislative body. The independent position of the executive was still further assured the next year, 1619, when the company in London passed an ordinance that the officers in Virginia should be maintained from the public lands, and that "no liberty should be granted tending to the exemption of any man from the authority of the governor." [3]

At the same time that the above action was taken, the

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[1] The document is printed in the "Virginia Magazine of History," II, 155.

[2] "Virginia Magazine of History," II, 156.

[3] This is printed in Force, III, with several other documents, entitled "Orders and Constitutions."

London Company passed a law limiting the governor's term of office and appointing power. We have seen that Delaware had been commissioned for life, with power to choose his own council. On his arrival in Virginia, he had at once chosen a council of seven persons.[1] It was now ordered that "the commissions to all Officers in Virginia shall be only for three years in certain, and afterward during the company's pleasure—Only the Governor shall upon no occasion hold that place above six years."[2] The council was to be chosen by the company in its quarter court by erection of hands; the more important officers, as governor, lieutenant governor, admiral and marshal were to be elected by ballot in a general court.

Governor Yeardley's commission expired in 1621, and as he refused to have it renewed, Sir Francis Wyatt succeeded him. All doubts as to the relation between the governor and the Assembly now disappear, for on July 24, 1621, there was issued by the London Company an ordinance establishing the Council of State and Assembly of Burgesses in Virginia.[3] By this order nineteen councillors were appointed to assist and advise the governor, to be known as the Council of State. The governor was empowered to summon the Assembly yearly, and was given the right of veto on all its acts. By express provision the council was to be a part of the Assembly. In case of the governor's death the council was empowered to choose a successor for the time being; but if this was not accomplished within fourteen days the lieutenant governor or treasurer was to hold the office.

The constitution of the executive as thus provided continued with but slight changes during the period under consideration.

When the London Company was dissolved, in 1624, the appointing power fell to the king, and the term of office was

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[1] Letter to the company, Niell, 42.
[2] Force, III, "Orders and Constitutions."
[3] Stith, I, Appendix, 32; Henning, I, 110.

during his good pleasure.[1] But further than this there was little change. The precedent established by the London Company was allowed to stand. A letter from the governor and Assembly to the king, immediately after the recall of the charter, shows the wish of the colonists in regard to the executive. They desire that "the governors sent over may not have absolute authority, but be restrained by the council, as hitherto; short continuance of the governor's term is very disadvantageous: the first year they are raw in experience; the second, begin to understand the affairs of the colony, and the third, prepare to return." [2] These requests were respected by tacit consent in the commission issued to Sir Francis Wyatt by the king, in 1624 [26th August], appointing a governor and a council of eleven persons. Power was conferred on this body to "perform and execute * * * direct, govern, correct, and punish * * * in the time of Peace or Warre * * * as *fully* and *amply* as any Governor and Council resident there, at any time within five years last past." [3]

This reference to the precedents of the past five years was understood as confirming the Assembly as constituted by the Virginia Company. The commission was not for any specified term, but to continue during the king's pleasure, and the governor and council were to be subject at all times to the royal instructions.

In 1626 Sir George Yeardley was reappointed to succeed Governor Wyatt and some minor additions were made to the functions of the executive officers. Power was given to the governor to issue commissions in his own name to the inhabitants of the colony licensing "expeditions" into the interior for trade and discovery and for defence against the Indians. Better insurance was made against vacancies by the provision that, in case of the death or forced absence of governor and deputy governor, the council was to appoint

[1] "State Papers," Colonial, July 3, 1624.
[2] "State Papers," February 28, 1624.
[3] Rymer's "Foedera," Tome 17, 618.

a governor selected from its own number; likewise, any vacancy in the council was to be immediately filled for the time being by the governor. At the same time the growth of executive business in the colony is indicated by the addition of a secretary of state to the list of officers.[1]

No change of importance was subsequently made in the constitution of the executive in Virginia by royal command. Berkeley's commission, in 1641, increased the council to eighteen members, and provided that each member, with ten servants, should be free from all taxes, except such as were levied expressly for war, "the building of a town or church, or to pay the minister's fees." [2]

Judicial matters within the colony at first belonged exclusively to the functions of the executive. When Governor Wyatt was first appointed in 1621, he was instructed to appoint times for the administration of justice, and the council was ordered to "sit one whole month about state affairs and law-suits."[3] Copies of these judicial proceedings were to be sent to the London Company. The governor was given absolute power to judge and punish any and all neglect or contempt of his authority on the part of any officer, except a councillor. In the latter case the quarter court, composed of governor and council, had jurisdiction.

Throughout this period the quarter court remained the supreme judicial body within the colony. The governor also at first possessed and exercised the power of establishing inferior courts in the counties and towns, and of appointing commissioners as judges to hold them.[4] But

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[1] Yeardley's commission is in Rymer's "Foedera" Tome 18, 311. See also his "Instructions" in the "Virginia Magazine of History," II, 393.

[2] Rymer's "Foedera," Tome 20, 484. The commission to Sir John Harvey in 1636 is in almost exactly the same words as Yeardley's. "De Commissione speciali Johannis Harvey, Militi, pro meliori Regimine Coloniæ in Virginiæ." Rymer, Tome 20, 3.

[3] Henning, I, 16.

[4] *Ibid.*, 131, 185, 176; see also "Instructions to Berkeley." "Virginia Magazine of History," II, 281.

after the constitution of the colonial Assembly, the power of regulating the lower courts was assumed by that body.[1] Nevertheless, in Virginia, as in the other colonies, the judicial functions continued to be the governor's most important duties. Criminal and civil suits of importance, testamentary affairs, as well as petty disputes of all descriptions, were heard and determined by him.[2]

It should not be overlooked that the governor was the military as well as the civil head of the colony. The two officers whose characters made the most indelible impression in the administration, Gates and Dale, were trained soldiers and ruled the colony on a military basis. Instructions to nearly all the governors conferred on them power to make war and negotiate treaties of peace. In 1648 the Assembly declared that this grant implied and warranted the levying of soldiers by the governor without the action of the Assembly.[3]

A great part of the routine and matter-of-fact "governing" of the colony was accomplished by means of the ordinary proclamations of the governor. The instructions to Yeardley and Berkeley specify, with great detail, that they are to exercise a general supervision over the planting and shipping of tobacco, the coming and going of masters of ships and their passengers, and the regulation of trade. The governors were always directed to see to the provision of proper places of worship and the maintenance of ministers. The proclamations carrying out these directions throw much light on the position the governor occupied. Many such "orders" issued before 1629 have been preserved. They relate to the price to be charged for commodities, dealings with the Indians, the planting and cultivating of tobacco, and similar subjects.[4]

During the period of the Commonwealth in England, after Virginia had submitted to the commissioners sent out

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[1] Henning, I, 125, 168.
[2] *Ibid*, 145.
[3] *Ibid.*, 355.
[4] *Ibid.*, 129.

by Parliament, the constituent source of the executive was entirely changed. Articles of agreement were entered into between the commissioners and the Assembly, by which the government was settled.[1] This act provided that the officers for the colony should be chosen for terms of one year, by the commissioners and the House of Burgesses for the first year, afterward by the House of Burgesses alone. Such officers were to continue to rule according to the instructions of Parliament, the laws of England and the orders of the Assembly. In accordance with these regulations Richard Bennet was elected governor early in 1652, being the first executive chosen by the representatives of the people in Virginia.[2]

The governor and council continued to be members of the Assembly, but were deprived of the veto. Otherwise, they exercised the same functions as before, except that a larger amount of executive and judicial business was now transacted by the Assembly. This arrangement continued until 1660 when, on the Restoration of King Charles in England, the Assembly in Virginia lost its ascendency over the executive and the governor became again the "king's officer." [3]

## Massachusetts.

The Massachusetts charter of 1629 is almost identical in character with the Virginia charter of 1612. It created a corporation to be known as the Governor and Company of Massachusetts Bay in New England, on which it conferred the entire management of the colony. Like the Virginia charter, it provided for the double organization of the company in England. In the first place, there was to be a governor, deputy and eighteen assistants, who were to meet

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[1] Henning, I, 363.

[2] Beside Bennet, three other governors were elected by the Assembly during this period. See Appendix, iii.

[3] See below, 70.

at least once a month for the "handling, ordering and dispatching of all such Buysinesses and Occurents as shall from time to time happen touching or concerning the said Company or Plantacon." In the second place, it provided that there should be held by the governor, or deputy, and at least seven assistants, four times each year, one "Great, generall and solemne Assemblie," to which the freemen of the company or members of the corporation were to be summoned. These General Courts were charged with the general administration of the affairs of the company. They were empowered to admit members into the corporation, choose all officers of the company, and "make Laws and Ordinances for the Good and Welfare of the said Company and for the government of the said Lands and Plantacon, and the people inhabiting and to inhabit the same," the only condition being that such acts should not be repugnant to the laws of England. The first governor, deputy and assistants were named by the king in the charter, but all subsequent choice of officers was to be made yearly in the Easter court. The governor was empowered to call meetings of the General Court, and the court could remove any officer and fill any vacancy.

Such was the organization of the company in England. In providing for the government within the colony, the charter left substantially the same freedom to the company as did the last Virginia charter. The only provision touching this point was for the appointment, by the governor and company in England, of "all Sortes of Officers, both superior and inferior, which they shall find needful for that Government and Plantacon;" such officers were to have "full Power and Authoritie to correct, punish, pardon, govern and rule according to instructions from the company."

In accord with this provision of the charter, the company, April 30, 1629, choose John Endicott governor of the colony, to be sent to Massachusetts. He was to be assisted by a council of twelve members, chosen by a most curious method. The company selected seven; these, with the gov-

ernor, were to choose three more; the two remaining were to be named by the colonists themselves. "The old planters that will live under our government are authorized to choose two of the discreetest men among themselves to be of the said counsell."[1] To the governor and his advisors thus selected, the company then delegated the power of naming whatever sub-officers they found necessary; of removing incompetent or objectionable officials, and of filling any vacancy that might occur. All officers were to hold for one year. The governor could call meetings of the court or council, which was empowered to enact "Laws, Ordinances, Orders and Constitutions" for the administration of justice and infliction of punishment on malefactors, and for the orderly government of the inhabitants.[2]

It will be seen that this, the first permanent government established in New England, was quite different from that first constituted for Virginia, though the royal grants upon which they were based are not greatly dissimilar. While Lord Delaware was made governor for life and empowered to choose his own council, Endicott was to hold office only one year, and a majority of his council was selected by the company in England, two of the remaining members being representatives of the actual colonists. Again, there was no provision for the exercise of martial law by Endicott; and, lastly, all the powers of government which, in Virginia, were expressly conferred on Governor Delaware, were, in Massachusetts, so far as they were conferred at all, given to the governor and council. Thus, from the very first, before there was evidence of any thought on the part of the company of removing with the charter from England to the colony, a government was contemplated which should consult the needs and desires of the colonists.

The Massachusetts charter has been compared with the

[1] "Transactions of the American Antiquarian Society," III; "Archæologia Americana," containing a portion of the records of the company of Massachusetts Bay.

[2] "Form of Government for Massachusetts Bay," Hazard, I, 268.

Virginia charter of 1612. In one important point, whether intentionally or not, they were different. The Virginia charter was express in locating the corporation in England; the Massachusetts charter was not. This omission gave opportunity for a step which has been made to account for the wide difference between the forms of executive developed in the two colonies, viz: the removal of the governor and company with the charter from England to the colony.[1] By this change all direct official relation with England was cut off, for, according to the charter itself, all interference with the independence of the corporation on the part of the king ceased with the appointment of the first governor and council. When they removed their place of meeting to Massachusetts, they left behind them no organization to represent the corporation. This change made possible the election of a governor and other executive officers by popular suffrage, the distinguishing feature of the executive in Massachusetts during this period. As long as a company resident in England exercised an ultimate control over the colony, the chief officers must have remained subject to appointment and removal by that company. But when the company settled in the colony, it could no longer maintain a distinct and exclusive organization. This is shown by what actually occurred.

After the transfer had been decided upon at a general court of the company in London,[2] officers were chosen who were willing to emigrate to New England and carry on the government there. On their arrival in Massachusetts these

[1] The legality of this act has been discussed pro and con by historians. Perhaps the condition is best expressed by saying that it was extra-legal. See H. L. Osgood; Oliver; "The Puritan Commonwealth," 26: "Lowell Institute Lectures," 1869, 371; Ellis: "Puritan Age in Massachusetts," chap. 2; Palfrey: "History of New England," I, 306.

[2] "Records of Massachusetts Bay," I, 49–59. The question of transfer was first proposed by the governor on the twenty-eighth of July and was discussed from time to time until the twentieth of October.

officers superseded the governor and council sent out there the year before, but continued for a time to act in the same capacity as while in London. The governor remained merely the president of the company, with no power to veto its legislative acts and no special civil or judicial capacity. The colonists still had no additional share in the government, except as they were admitted into the body of freemen of the company. This status, however, could not continue long. By the admission of colonists into the rights of freemen of the company, the latter tended to become co-extensive with the colony, which thus became a self-governing commonwealth.[1] From this time the company began to reshape its organization to meet the demands of this new position without unnecessarily violating the letter of the charter. The first act that indicated this was a resolution passed at the first General Court held in Massachusetts, August 28, 1630, providing that the governor and deputy governor should always, by virtue of their office, be justices of the peace, with the same powers as justices of the peace in England. They were empowered to arrest and imprison offenders, and, with the approval of any one councillor, inflict corporal punishment.[2] On being vested with these powers, impossible on the part of a president of a corporation in England, the governor became in fact the civil officer of a commonwealth.

The mode of electing the governor was changed several times before it was permanently fixed. For the first two or three years after the removal of the company the governor was chosen by the assistants, who were themselves elected by the Freemen in the General Court.[3] Then, in 1632, the freemen grew jealous and provided for the choosing of the

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[1] "Records," I, 79, 87. On October 19, 1630, 108 persons resident in the colony applied for admission to the corporation; and on May 18, 1631, the General Court enacted that only church members were to be admitted as freemen.

[2] "Records," I, 74. [3] *Ibid.*, 79

governor and deputy governor, along with the assistants, by the court.[1] Even when the whole body of freemen no longer met for legislative purposes, but sent instead representatives to the General Court, they continued to assemble once every year in a General Court of Election for the selection of their magistrates. As the colony increased in size, however, this became impracticable, and a system of voting by proxy was devised for elections.[2] The proxy system was never satisfactory and in 1640 another method was adopted, which, with slight changes in 1642 and 1646, continued until the recall of the charter in 1691. It provided that the freemen should meet in their towns, cast their votes for the magistrates, and send them sealed to the General Court, where they were to be opened and counted.[3]

The charter provided that the governor's council should consist of thirteen assistants. This number was seldom chosen, nine being the usual limit. In 1631 an act was passed providing that when the number of assistants in the colony was less even than nine, the majority of those present at any meeting might transact business as lawfully as though the entire number were present.[4] An attempt was made in 1635 to increase the dignity and importance of the magistrates by the creation of a standing council, composed of six magistrates, chosen for life, of which the governor was to be president. This council was given some authority during the intervals when the General Court was not in session.[5] It did not, however, supersede the council of assistants, and indeed it was rather difficult to determine just what functions it was intended to perform. In 1639 it was given the military power which had formerly been placed in commission, but its powers were never clearly defined and immediately an outcry was raised against it because of the life tenure of its members. The General Court

[1] Records," I, 95.
[2] *Ibid.*, 188, 118.
[3] *Ibid.*, 333; II, 37; III, 86.
[4] *Ibid.*, 84.
[5] *Ibid.*, 167, 183, 192.

was compelled to pass an act declaring that the new council was not to take the place of any of the magistrates yearly elected.[1]

The governor in Massachusetts did not possess a direct veto on legislation as did the governor in Virginia.[2] But both governor and assistants were a part of the General Court, and so had a voice in the enacting of laws, at first sitting with the freemen or their deputies, but after 1643 as a separate house.[3] In case of a tie vote in the Assembly, the governor could cast a deciding vote.[4] He might call meetings of the General Court, but could not adjourn or dissolve them.[5] Moreover, such meetings were not left dependent upon the call of the governor, but were fixed at stated intervals by the court itself. No permanent salary was settled on the governor, as in Virginia; he was granted an allowance each year by the court, and was thus dependent upon the legislature for his support.[6]

It was in judicial matters that the governor and assistants found their greatest influence and importance. They constituted the highest court of the colony. One of the first laws after the transfer of the charter was that of September, 1630, enacting that the court of assistants should meet every third Friday; but the next year this was changed to the fourth Tuesday of each month.[7] These courts are important, "their business being that of adjudicating, as

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[1] "Records," I, 264. Inasmuch as it has been taken by some as though a new order of magistrates, contrary to the patent, are created by the order for a standing council for life, it is ordered that such was not the intent of the act, but that such councillors were to be chosen as had formerly been chief magistrates; acts of such councillors not to have any force, except as they be chosen to some place of magistracy by annual election, their acts to be done as magistrates and not as councillors.

[2] "Records," I, 169, March 3, 1635–6.

[3] *Ibid.*, II, 58; Dane, Prescott and Story: "Charters and General Laws of the Colony of Massachusetts Bay," 88.

[4] "Dane, Prescott and Story, 90. [5] "Records," I, 118.

[6] *Ibid.*, 106, 128, 215, 319. [7] *Ibid.*, 75.

well as legislating, upon matters of organization, civil and criminal jurisprudence, probate and police."[1] In 1634 after the establishment of inferior courts, the court of assistants, composed of the governor and assistants, met twice a year, or oftener at the call of the governor. It had jurisdiction in appeals from lower courts, and original jurisdiction in all cases of demise and capital and criminal causes. At the same time the judicial functions of the General Court were limited to appeals from the court of assistants, and impeachments.[2] The pardoning power was in the General Court alone; but the governor, deputy and three assistants could grant reprieve.[3]

The military power of the governor was not so ample as in the other colonies. The General Court undertook to regulate military affairs to the minutest detail of drilling.[4] In 1634 a commission composed of the governor and three others was appointed and given charge of all wars that might occur within one year.[5] In the following March this commission was given absolute military power to arm, train, declare martial law and put offenders to death. In 1636 the military force was ranked in three regiments, with the governor as commander-in-chief; the inferior officers were chosen by the General Court on the recommendation of the regiments and the towns.[6] The military power of the governor and council was further extended in 1645, by giving them authority during the intervals between the sessions of the court to levy soldiers for the defence of the colony.[7]

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[1] "Palfrey," I, 325.

[2] Dane, Prescott and Story, 88. Whitmore: "Colonial Laws of Massachusetts," 3, 152.

[3] Dane, Prescott and Story, 89.

[4] "Records," II, 42.

[5] *Ibid.*, I, 125, 138, 146.

[6] *Ibid.*, 86.

[7] Whitmore, 33; "Records," I, 142, 209.

A bodyguard was allowed the governor in 1634, to be sustained at public charge and to attend him on the first day of every session of the General Court. In the "Collections of the Massachusetts Historical Society" for 1798 there was published an "abstract of the laws of New England as they are now established. Printed in Lon-

Considerable anxiety was manifested from time to time on the part of the more democratically inclined of the colonists in Massachusetts, lest the government should fall into the hands of the few and a tyranny be developed. Although the officers were elected by the people and none for a longer time than one year, the practice soon arose of re-electing satisfactory and efficient officers year after year. Doubtless the same inconvenience arising from frequent change of officers was experienced as in Virginia. During the thirty years, from 1630 to 1660, three men, John Winthrop, Thomas Dudley and John Endicott, held the office of governor for twenty-six years.[1] Elections were held each year and no governor held the office for more than five successive terms, yet it was feared by some that the office was becoming hereditary.

Two of these men who administered the office of chief executive so long were undoubtedly supporters of an aristocratic government. John Winthrop, the father of the colony, was descended from an old Suffolk family, noted for its attachment to the reformed religion since the earliest period of the Reformation.[2] His ancestors had been lawyers of note since the reign of Henry VIII, and the future

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don in 1641." In this abstract the duties of the magistrates are summarized as follows:

(1) The governor alone has power to call general courts by warrant.

(2) With the assistants he has power to see that the laws are executed.

(3) To consult and provide for the maintenance of the state and people.

(4) To hear and decide appeals from inferior courts.

(5) To preserve religion.

(6) To oversee the forts and take order for the protection of the country from invasion and sedition.

(7) To hear and decide all causes brought before them throughout the commonwealth.

[1] See Appendix, I.

[2] Moore: "Lives of the Governors of Massachusetts," 237.

governor of Massachusetts had been early trained to the legal profession. At the age of eighteen he was made a justice of the peace. In the office of governor of Massachusetts, Winthrop devoted his entire time and energy to the public service. His idea of the administration of justice was that the severity of the law should be tempered with mercy, judging that in the infancy of a colony the law should be administered with greater laxity than in a settled state.

Winthrop's views on this subject met with the strong opposition of the clergy and of several governors, among them Thomas Dudley. Dudley, the son of a soldier, educated in the household of an earl, and trained in the office of a judge, stood for the strict and unflinching enforcement of the letter of the law. Governor Winthrop was charged with being too lenient in dealing with malefactors. The question of policy was referred to the clergy, who decided that in a young colony a more strict enforcement of the law was necessary than in an old state. Henceforth this was the policy of the government, even Winthrop yielding to the judgment of the ministers and confessing himself in error.

In one other respect the views of Winthrop were not in harmony with those of the majority of the colonists and were eventually thwarted. He did not have a very high opinion of the self-governing ability of the common people and deprecated extreme democratical forms. He is said to have "plainly perceived dangers in referring matters of council and judgment to the body of the people." It was one of his maxims that "the best part of a community is always the least, and of that least the wiser is always the lesser; wherefore the old law was, 'choose ye out judges,' etc." Winthrop struggled against the assumption of power by the popular body, boldly asserting that magistrates once chosen had authority from God. But, although he was entirely vindicated when brought to trial on the specific

charge of exceeding his power,[1] he was compelled to see the scope of functions of the General Court constantly widen to the prejudice of the governor and council.

The colony of Plymouth offers no points of importance in addition to that of Massachusetts, so far as concern the organization of the executive. During the first ten years of its existence the colony had no legal connection with England whatever. Its only foundation in law was the charter of 1629, obtained from the Plymouth Company. But this never received the sanction of the king. Hence, when the Plymouth Company was dissolved in 1634, the colony legally fell to the crown as a royal province. As in Massachusetts, there was a governor[2] and a council of assistants chosen yearly in a general court of the freemen.[3] At first there was but one assistant; in 1624 five were chosen, and in 1637, seven, which number was retained until 1691, when the colony was incorporated with Massachusetts.[4]

### Rhode Island.

Rhode Island and Connecticut, planted by exile emigrants from Massachusetts, who were for a long time without any legal title to the land they occupied, present extreme forms of democratic organization. At first the affairs of government were actually administered by the whole body of freemen. Committees were appointed or the "Elders" instructed to look after the general welfare of the plantations between the general public meetings of the freemen.

In Providence Plantation the executive was first repre-

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[1] "The Hingham Case," see below, 74. [2] See Appendix, II.

[3] "Plymouth Colony Records, Laws," 7,

[4] Bradford: "History of Plymouth Plantations," 90, 156; "Records, Laws," 8. The governor called meetings of the Assembly and presided; governor and Assembly "advised" in public and private over the affairs of the colony and assisted in examining and punishing offenders; courts were held once a month.

sented by five dispensers or selectmen, who were to call quarterly meetings of the town and look after the general public business.[1] At Portsmouth, William Coddington was chosen "judge," and three elders, selected by lot, were to assist him in doing justice and judgment. After the founding of Newport and the transfer to that place of the Portsmouth records, the titles of the officers were changed to governor, deputy and assistants, of which latter there were seven. These officers were all chosen yearly by the freemen assembled in general court, and were invested with the powers of justices of the peace, to hold judicial court once a month.[2]

These towns recognized the sovereignty of the king, but, without commission from any authority possessing legal jurisdiction over the territory, they assumed the right and power of organizing themselves independently into bodies politic.[3] The settlers at Warwick, on the other hand, refused to organize a government because they held that so long as they were loyal English subjects they had no lawful right to take such a step, and denied the authority of the other town governments because not legally derived from England.[4]

But this whole question was settled in 1643 by the patent for the incorporation of Providence Plantations, in Narragansett Bay, from Earl Warwick, Parliamentary governor-in-chief of all the colonies in America. This document granted the inhabitants a free charter of incorporation, with full powers to form such a government as they desired,

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[1] "Records," I, 27.

[2] *Ibid.*, 52, 63, 98, 115.

[3] They were constantly in fear, however, that their jurisdiction would be questioned. This fear was justified when several persons living near Providence offered themselves and their lands to the protection of Massachusetts, which was readily accepted. "Arnold," I, 111. Newport passed a law in 1642, providing that no person should sell land lying within the jurisdiction to any person outside that jurisdiction, on pain of forfeiture. "Records," I, 126, 57, 401.

[4] *Ibid.*, 129.

provided it was conformable to the laws of England and subject to the Parliamentary commission.[1] In 1647 the four towns united to form a government under this patent.[2] The general officers constituted were a president, four assistants, a secretary and a treasurer, all to be chosen yearly by ballot in a general court of elections.[3] Each town had the privilege of nominating one person for president and two each for assistants. The president and assistants were by virtue of their office conservators of peace, and sat once a year in each town as a general court of trials. This court was the most important organ in the government; it had jurisdiction of all important civil cases, disputes between towns and all capital crimes. The president and assistants were subject to trial before the Assembly.[4] In 1650 an attorney general was appointed to be the legal representative of the colony.[5] The president and council might call special meetings of the General Court, but had no voice whatever in making laws.[6]

## Connecticut.

The settlements on the Connecticut were chiefly the result of emigration from Massachusetts. A number of inhabitants of Watertown, Newton and Dorchester, becoming dissatisfied with their location, petitioned the General Court of Massachusetts for permission to remove to the Connecticut River. The petition was granted March 3, 1635, and the Massachusetts court appointed six of their number commissioners to the new settlement for one year, with power to "hear and determine in a judicial way" all matters of dispute; "to make and decree such Orders as shall best

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[1] Hazard, I, 538.

[2] The Convention or Assembly which formed the government declared that it should be "one held by the free and voluntary consent of all or the greater part of the inhabitants." "Records," I, 191.

[3] "Records," I, 148.

[4] *Ibid.*, 191.

[5] *Ibid.*, 226.

[6] *Ibid.*, 236.

conduce to the public good;" and to call general meetings or courts of the inhabitants. The Massachusetts court reserved the right to recall the commission before the end of the year if desirable.[1] At the end of the first year the commission was not renewed, but the government of the settlement was placed in the hands of a general court or meeting, in which the inhabitants were represented by two persons from each community.[2] On extraordinary occasions "committees" of three, in addition, were sent by each town to the court.

In 1639 the freemen of the several towns met and framed the famous compact known as the Fundamental Orders. The executive provided for in this instrument was similar to that of Massachusetts: a governor and council of six magistrates chosen yearly by the freemen in a general assembly or court of elections. Eligibility to the office of governor consisted in being a member of an approved congregation, and of having been formerly a member of the council. Nominations were to be made by each town through its deputies to the General Court; but no governor could serve twice in succession. The governor was given power to issue warrants for the summoning of the courts twice a year, or oftener, if he saw occasion. But the court was independent and could meet without his call should he fail in his duty. As in the other New England colonies, the governor was the presiding officer, with a casting vote in case of a tie, but

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[1] Hazard, I, 321. Like the founders of Rhode Island, these settlers had no legal title to the land they occupied. In 1631 a patent covering the territory of Connecticut was granted by Earl Warwick, president of the Plymouth Council, to Lords Say, Brook, and others. Hazard, I, 318. In July, 1635, these proprietors granted a commission to John Winthrop as governor of Connecticut, by whom a fort was erected at the mouth of the Connecticut River. The records show that up to the granting of the charter of 1663 the settlers on the Connecticut were constantly in fear that their rights and property would be questioned by the beneficiary of this patent. "Records," I, 266, 568, 573.

[2] "Records," I, 9; Trumbull, I, 64; Palfrey, I, 455.

with no veto or other control over the acts of the court.[1] In 1641 the salary of the governor was fixed at 160 bushels of corn; this was changed in 1637 to thirty pounds sterling.[2]

As in Massachusetts, so in Connecticut, the most important function of the executive was judicial. The governor and council sat quarterly in judicial capacity as "Particular Courts," where were heard all appeals from lower courts, all criminal causes, all civil suits of over 40 shillings value, and all cases involving title to land.[3] It possessed all the authority now held by the county and inferior courts, and for considerable time was vested with such discretionary powers as none of the courts at this day would venture to exercise."[4] This discretionary power of the magistrates went so far as almost to give them control of the verdict of the jury. Juries were allowed to convict by majority, but if the magistrate conceived the verdict not in accord with the facts, "the jury might be sent out a second time, and if the verdict was still unfavorable, the case might be committed to a new jury."[5] In case any of the magistrates were absent from the colony, a particular court might be held by the governor or deputy and two magistrates, or by three magistrates, without the governor or deputy.[6]

The colonists who settled at New Haven emigrated from England under the leadership of John Davenport, without a charter or legal title to the territory upon which they intended to plant. The colony was founded strictly upon religious principles. At the first meeting of the freemen of which record is kept, January 4, 1639, it was noted that the Scriptures hold forth a perfect rule for the direction of all government, and that only church members could be enfranchised freemen. The religious tenor thus imparted continued throughout the history of the colony. Before a

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[1] This compact has been printed in many places; see Poore's "Collections of Charters and Constitutions."

[2] "Records," I, 69. [3] *Ibid.*, 71. [4] Trumbull, I, 115.

[5] "Records," I, 84, 117. [6] *Ibid.*, 150.

civil government was provided, a church was organized by the choice of twelve men, who in turn were to choose any seven of their number to "begin the church."

It was nearly nine months after this before the organization of a civil government was completed. On October 25, 1639, the records say, the court met and proceeded to abrogate "all former trust for managing any public affair in this plantation, into whose hands soever formerly committed."[1] Then for the first time a magistrate and officers for the civil ordering of the community were chosen. Thomas Eaton was chosen "magistrate" for one year, four deputies were appointed to advise him as a council; a public notary to keep the records of public business, and a marshal completed the list of officers.

Several other settlements soon arose in the vicinity, at Guilford, Milford and Stamford, with an organization similar to that of New Haven. It was not long, however, before the spirit of confederation began to dominate these plantations and by 1643 a union was formed and a constitution agreed upon for the whole jurisdiction. This provided for the yearly election of a governor and deputy governor. These officers, together with two deputies from each plantation, composed a general court, which continued to be the principal organ of the government. It elected all officers for the united government as well as the magistrates for the several towns.[2] In judicial matters the magistrates of each town acted as a court for all cases under twenty pounds value. Appeals from these courts, as well as all more important cases, were heard by the "Court of Magistrates for the Jurisdiction." In 1644 a council of war was appointed, consisting of the governor and magistrates and the captain and lieutenant, to which was entrusted all military affairs.[3]

Though the constitution provided for yearly election of

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[1] "Records," I, 20.
[2] *Ibid.*, 114.
[3] *Ibid.*, 135, 167, 484.

officers, the same results followed as in Massachusetts. From the founding of the colony in 1657, Mr. Eaton held the office of governor continuously, the deputy governor for the larger part of the same period being Mr. Goodyeare. Add to this the fact that Eaton and Goodyeare were repeatedly chosen commissioners to the New England Confederation, and one may realize the important part played in the administration of the colony by these men. Closely associated with Eaton was John Davenport, the spiritual leader and adviser of the colony. These two men had been schoolmates together at Coventry, England, and each early manifested the talents later displayed in their work at New Haven. Davenport became a clergyman, vicar of St. Stephens, and famed as one of the ablest preachers of London. Eaton, soon prospering as a merchant, was elected deputy governor of the fellowship of Eastland Merchants and was sent by that organization to superintend its affairs in the Baltic countries. Both were ardent Puritans and forced to leave England because of the "High Commission" persecutions of Archbishop Laud. Thus fitted for their undertaking, these men brought to the colony the value of practical experience in English law and business, and it is not without propriety that they have been called the "Moses and Aaron of New Haven."

## Maryland.

Two types of colonial executive have been described, both of which grew out of the corporation. In one the corporation was dissolved and the appointing power reverted to the king; in the other the corporation moved to the colony where the freemen became the sole constituent source of governmental power. Intermediary between these forms is that in which the controlling agency was neither king nor freemen but the proprietor, a semi-royal feudal tenant who himself exercised the executive power

within the colony or delegated it to officers appointed and instructed solely by him.[1]

The charter for Maryland granted to Lord Baltimore in 1632, vested in him a governmental jurisdiction, complete and absolute with but two exceptions. On the side of the king, he was limited by a clause requiring allegiance and fealty in behalf of his province. But this restriction was for practical purposes nullified by two circumstances: the laws enacted with the proprietor's authority were to be valid without any sanction by the king; and there was no method provided by which the ordinary governmental acts of Lord Baltimore in the colony could be officially taken note of by the English government.[2] On the side of the colony, the proprietor was limited by the provision requiring the assent of the freemen in the enacting of laws; otherwise, he was free to organize the government in whatever manner he choose. But again, two conditions might practically nullify even this limitation. They are as follows: the proprietor was vested with the power of issuing ordinances to an unlimited extent, provided they did not deprive any person of life or property; secondly, the charter contained no clause fixing the qualifications requisite to the status of freemen, nor touching the time or manner of their assembling for legislative purposes. Thus the political status of the colonists, as well as the constitution of any assembly for legislation, were left entirely to the determination of the proprietor; and at the same time

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[1] Legally, the proprietor of Maryland was a count palatine and his territory a palatinate. In one case at least he pleaded this character of his grant as justifying his royal jurisdiction. His grant was modelled on the palatine jurisdiction of the Bishop of Durham, one of the two greatest tenants of the king since the Norman Conquest. "Archives of Maryland," Assembly, 264.

[2] "Archives," Council, 17. Here are given the objections raised by the Privy Council to the granting of such a large scope of power to Baltimore. Chalmers: "Annals," 203.

he was given a mode of legislating without consulting the freemen at all.

The latitude left to the judgment of the proprietor in these matters, together with the powers expressly conferred upon him, gave him an almost royal jurisdiction. He was granted full and complete judicial authority, empowered to levy war and conclude peace, to exercise martial law as fully as any captain general of an army, to levy taxes direct and indirect, to grant out land to be held of himself and not of the king, in opposition to the statute "quia emptores," and to erect manors with courts baron. Indeed, had the proprietor taken up his residence within the colony, we should have been compelled to regard the executive there not only as practically independent of all restraint from outside the colony, as was the case in Massachusetts, but also as independent of the freemen, so far as concerned the source, scope and duration of authority, a condition which could not have arisen in either Massachusetts or Virginia. But during the period under consideration, the proprietor did not visit the colony in person. The real executive in Maryland is, therefore, to be studied, as in Virginia, as controlled and directed from England, though not by the king.

Leonard Calvert, the brother of the proprietor, was appointed the first governor of Maryland. His first commission and instructions, naming two persons as counselors or assistants, were issued in 1634, while he was still in England.[1] These documents are not in existence, and very little can be determined concerning the character of the government before the commission of 1637 was issued.[2]

This latter instrument renewed the appointment of Leonard Calvert and provided very amply for the constitution of the colonial government.[3] Calvert was made "Lieu-

[1] Bozman: "History of Maryland," II, 26.

[2] It is known that an assembly of the colonists was held in 1635, but none of its acts have been preserved. See Chalmers, 210, 232.

[3] "Archives," Council, 49.

tenant General, Admiral, Chief Captain and Commander of the Province," with all the powers usually exercised by such an officer. These powers, as was usual in the colonies, consisted in a crude mixture of legislative and judicial functions along with executive and military. On the legislative side, the governor was instructed to call an assembly of the freemen in the following January, and empowered to summon similar assemblies thereafter at his pleasure, and to adjourn and dissolve them at will. The commission does not state expressly whether or not the governor and his council were to be members of the Assembly, but it seems to have been understood that such was the intention, for at the first Assembly, in January, 1638, they were present and the governor presided.[1] No mention is made of a governor's veto, but all laws and acts were to be sent to the proprietor for confirmation. Moreover, the governor was vested with the ordinance power in the same form and to the same extent as it was conferred on the proprietor.

In judicial affairs, the governor was instructed and empowered to hear, and finally judge, all civil actions and all criminal cases, except capital, as fully and finally as the proprietor would do if present in the colony. In cases either capital or touching freehold titles, he could act only with the consent of his council, and then only according to laws enacted in the colony. This limitation to laws of colonial origin shows a desire on the part of the proprietor to have matters of importance adjusted in accordance with the peculiar needs and requirements of the colony, rather than transplant wholesale the laws of England, whether or not they were suited to the conditions of life in America. The governor was further given full power to pardon all crimes and offences except high treason.

As high chancellor the governor was entrusted with the keeping of the seal and the passing of all writs and warrants under it. The appointing of minor officers necessary for

[1] "Archives," Assembly, 2.

the government of the province, was in his hands. He was to choose his own deputy to act in his absence, and all the land in the province was subject to his disposal by grants in the name of the proprietor.

By this commission the entire administration of the colony was placed under the control of the governor. For, though assemblies of the freemen were contemplated, the frequency of their meeting and the length of their sitting were matters for the chief executive alone to determine. Not only this, but ample means were provided to the governor, by his ordinance power, for carrying on the government almost indefinitely without consulting the colonists. In short, the privileges and liberties enjoyed by the people in the colony were not due to express and positive provisions either of the charter or of the instructions to the governors, so much as to the simple intention and determination of the proprietor to rule the colony in accordance with the principle of justice and the wishes of the colonists. Thus, while he kept the regulation of assemblies jealously subject to his discretion, as a matter of fact they were called regularly at intervals of one or two years and allowed great freedom in deliberation. In 1638 the process of enacting laws was simplified by giving the veto power to the governor, subject, however, to the proprietor's confirmation. Laws signed by the governor had full validity unless and until rejected by the proprietor.[1] The governor claimed and exercised the right, even after the primary assembly of freemen had been replaced by a system of representation, of summoning certain persons by special writ; but in 1647[2] this menace to the liberties of the freemen was removed by resolving the Assembly into two houses and permitting the representatives of the people to sit by themselves.[3]

[1] "Archives," Assembly, 31; Doyle, 289.

[2] The exact date is doubtful; "Archives," Assembly, 261: Chalmers, 219; Bancroft, I, 257.

[3] "Archives," Assembly, 272.

The constitution of the executive, as thus provided, was not materially altered during the period before the Restoration. New commissions were issued to Leonard Calvert, in 1642 and 1644, in almost the same language as that of 1637, the only change of importance being the more definite and express settlement of the relations between governor and Assembly. The governor was to be "*in* the Assembly" and in the name of the proprietor to assent to the laws passed.[1] The council was increased to five and its members made magistrates with power to arrest and commit to jail.[2]

By these commissions Leonard Calvert was continued in the office of chief executive from the inception of the colony until 1648. During these fourteen years the administration was marked by wisdom and efficiency. For a portion of the period the task of the governor was made especially difficult by the disturbance in England occasioned by the civil wars. Lord Baltimore had at first cast his lot with the royal party, and when Parliament gained the ascendency, Leonard Calvert, fearing the loss of the colony as the result of support to the defeated king, thought it prudent to visit England. There is no evidence that the committee appointed by Parliament to govern the colonies made any attempt at this time to enforce its authority in Maryland, but the absence of the governor and the uncertainty attending the outcome of the civil war, gave opportunity for the lawless and rebellious element to rise in opposition to the government. Returning with a new commission, Governor Calvert at once attempted to reassert his authority and restore order. At first he was not successful, the rebels Claiborne and Ingle driving him from the province. For a time the colony was practically without a government. In 1645 one Hill, acting with the concurrence of the council and assuming to hold a commission from Governor Calvert, summoned a meeting of the Assem-

[1] "Archives," Council, 110. [2] *Ibid.*, 114.

bly. Before it met, however, Calvert, having collected a small force, with the assistance of Virginia restored order and drove the rebels from the colony. The governor hastened to place the government of the province on its proper peaceful basis, and the people welcomed back their former ruler as the representative of order. It is said that his benignant administration never gave anyone cause to complain.[1]

On the death of Governor Calvert, in 1647, the proprietor appointed William Stone to succeed him, with somewhat enlarged powers. In addition to the councillors already named, Governor Stone was permitted to add to the council two or three persons of his own choosing.[2] This was a wise concession. The governor, being present in the colony, was better able to judge of the fitness of councillors than the proprietor. In all subsequent commissions as late as 1660 this one to Stone was cited as the precedent in fixing the powers of the executive officers.

For a short time during the Commonwealth period Lord Baltimore was deprived of the administration of Maryland. On the arrival of the commissioners sent out by Parliament in 1651 to reduce the colonies in the region of the Chesapeake, a compromise was made with Governor Stone by which he was allowed to retain his office until Cromwell should decide whether to confirm Baltimore's charter.[3] The proprietor, however, having recognized the authority of Cromwell, and claiming that his title to Maryland was as valid under Parliament as under the king, violated this agreement by instructing Governor Stone to administer the province in his (Baltimore's) name as before. The result of this hasty action was the deposition of Stone and the placing of the governor's office in commission.[4] Ten men were appointed by the representatives of Parliament to

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[1] Sparks: "American Biography," Second Series, IX, 27.
[2] "Archives," Council, 201.
[3] McMahon, 205, 209.
[4] "Archives," Council, 311.

administer the executive functions, and the oath of allegiance to the proprietor was dispensed with. This government, entirely independent of Baltimore, continued two years.

In November, 1657, Cromwell finally reached a decision by confirming Lord Baltimore in his rights and titles to Maryland. The proprietor at once restored the executive of the province to its former position by renewing his former appointment of Josia Fendall as governor, under a commission similar to that held by Governor Stone. Governor Fendall arrived in the colony in February, 1658, and at once called a meeting of the council, at which he published the agreement made between Baltimore and the representatives of Cromwell. It provided that the commissioners should surrender Maryland to the proprietor on condition that the latter should grant an amnesty to those who had opposed him, and permit them to leave the colony if they desired. These terms having been satisfactorily arranged, the province of Maryland was formally restored to the authority of Lord Baltimore, March 27, 1657.[1]

As the province increased in size the judicial functions of the governor became more important and soon grew to be the chief source of his influence. With his council he constituted the supreme court of the colony, to which appeals were allowed from every inferior court. He appointed all judges and commissioners for the lower courts and for special courts to hear particular cases.[2] In civil cases the jurisdiction of the governor and council was final. Criminal cases, touching life or limb, were left to the decision of a jury of twelve. "As admiral the governor was to preside over the admiralty court, as chancellor over the chancery court, and by special commission over the so-called pretorial court of St. Mary's."[3] He was also to act as judge in the county court of St. Mary's with commissioners appointed by the proprietor.

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[1] "Archives," Council, 333.
[2] "Archives," Assembly, 147, 182. [3] Doyle, 298.

Considerable correspondence was carried on between the proprietor and the governors. Many commissions and letters of instruction were issued to the various minor officers, as secretary, keeper of the records, surveyor, etc., the appointment of whom was carefully retained by the proprietor. In fact, Lord Baltimore showed himself at all times vigilant that his control of the administration of the province should in nowise be weakened. He was wealthy, tolerant and possessed a marked ability; and his time, his talents and his riches were freely used for the welfare of his colony. Yet he belonged to the court party, was accustomed to centralized power, and the traditions of his family were those of an hereditary aristocracy. These institutions he would have transplanted to America. It was only by the constantly aggressive attitude of the Assembly and its determined resistance to centralization that the rights of that body were more and more clearly recognized and defined, and thus the scope of the governor's power gradually narrowed.

## CHAPTER III.

## ENGLISH ADMINISTRATION OF THE COLONIES.

The statement has been frequently made that the development of the colonies and the form which their governments assumed during the first half of the seventeenth century, were due to the neglect rather more than to the care of the English government; that the Stuart kings were too busily occupied with devising means to maintain their independent position in England to successfully carry out any extensive colonial policy; and that such a policy was conceived of only after the Restoration of Charles II.[1]

While these statements are partially true in a very loose and general way, they cannot be taken as expressing the whole truth as regards the relations between England and the colonies, or as accounting for the so-called colonial policy which, it is claimed, originated after 1660. There

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[1] Doyle: "Virginia, Maryland and the Carolinas," 314. Schouler: "Constitutional Studies," 15. Doyle says, "The Restoration marked the beginning of a definite and connected policy which aimed at treating the colonies not as isolated provinces to be dealt with in a spirit of capricious favor, but as a connected whole, to be administered on fixed principles." He then refers to the independent sovereignty of Lord Baltimore as an anomaly against which this new policy was a protest. Yet we know that the Restoration brought a fresh recognition of Baltimore's rights. Doyle, in the above statement, refers to the commission that was appointed in 1660. But this commission was entrusted with no powers and represented no principles not already entrusted to similar commissions before the Restoration.

was a colonial policy before that date which was only continued and enlarged upon afterward until, in the first quarter of the eighteenth century, the colonial department was placed in charge of one of the secretaries who had a seat in the ministry. The political policy which prevailed in the seventeenth as well as the eighteenth century, was that of regulating, systematizing and centralizing the administration of the colonies by bringing their executive officers into closer dependence upon authorities in England. It developed from the necessity of checking the tendency on the part of the colonial companies toward independence and self-control, and this tendency was manifested almost as soon as the companies had succeeded in permanently establishing colonies. Two facts explain why this tendency could cause the English government difficulty. In the first place, the statesmen who drew up the charters thought merely of making regulations for commercial undertakings. They had no conception of the far-reaching consequences of their acts; the rise of a few trading posts into an empire was not anticipated. Therefore, the grants of territory and jurisdiction were so extensive and liberal that, as the colonies grew in size there were no means by which, in accordance with their charters, the companies could be adequately controlled. The second fact is the great distance between the colonies and England. A corporation resident in England but whose property interests and business connections were entirely with a body of planters and colonists three thousand miles across the sea, could not be handled with the same ease as a merchants' guild located in London; much less could a corporation which was itself resident in the distant colony. Because of these conditions there was adopted by the English government this plan of centering all executive control of the colonies in the hands of one body, and thus enforcing an uniform and effective system of administration. And to find the origin of the colonial policy in its political aspect, we must go back to the first instance when this was attempted.

Originally the relations between England and the colonies were conducted entirely through the agency of the Privy Council along with the domestic and foreign business. But as the colonies increased in size and the colonial questions became more important, the time and attention required for this work grew to be more than the Privy Council could devote to it. That body then began to delegate colonial business to committees and boards composed either of its own members or other parties interested in the colonies and familiar with their needs. Appointed at first for some one special purpose and with a definite end in view, these boards soon became permanent bodies entrusted with the general oversight and control of all colonial relations.

The first of these special commissions was appointed in 1623 by the Privy Council at the king's command, with a view to enquiring into the too liberal and democratic government of the colony of Virginia by the Virginia Company.[1] It was composed of Sir William Jones and six others, who were given "full Power and Authoritie to view, peruse and consider all letters-Patent, charters, Proclamations, Commissions and other Acts; all Warrants, Records, Books, Accounts, Entries and other Writings whatsoever concerning the said Colonies or Plantations, or concerning the several Companies or Corporations;" to determine whether such charters had been violated; to investigate all expenditures of money in the colonies; to examine the laws made and the mode of government in use; to summon and examine under oath all witnesses necessary for the above; "to certify unto the said Lords and others of the Privy Council, from Tyme to Tyme, your proceedings therein; to the End that such further order may be given therein as shall be fitt." [2]

[1] "Colonial Papers," April 17 and 18, 1623. The commission is printed in Hazard, I, 155.

[2] The real object of this commission was undoubtedly to arrest the democratic tendency of the Virginia Company, which had been mani-

During the time that this commission was conducting its investigation the Privy Council continued to transact colonial business in its regular sessions, the king frequently urging the councillors "diligently and daily to attend to the business of Virginia until it be fully agreed and concluded."[1] Rules were set down "for the bettering of the government in Virginia," pointing out reforms and improvements to be made, and directing the officers in the colony to be attentive to the instructions of the Privy Council in all things.[2]

These proceedings continued until the twentieth of October, 1623, when the commissioners reported adversely to the colony, representing its condition as very unfavorable.[3] Accordingly, after an opinion regarding the points of law involved had been delivered by the attorney general to the king, the Privy Council ordered the Virginia Company to surrender its charter.[4] By the execution of this act the corporation lost all control of the colony, though it continued for some time in possession of certain property. From this time the king assumed control of Virginia. It was his intention to return to the double council system, one in London, with power to appoint and direct another in the colony.[5]

This plan, however, was not carried out. Instead, a committee of the Privy Council was appointed, June 24, 1624, to advise with the king concerning the best mode of governing the colony.[6]

This committee was composed of Lord Mandeville, presi-

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fested by the election, against the king's wish, of Sir Edwin Sandys to the treasurership in 1619. Stith, 159.

[1] "Colonial Papers," May 22, June 30, 1623.

[2] *Ibid.*, July 2 and 3, 1623.

[3] *Ibid.*, October 8 and 15, 1623. Also the Preamble of the Commission to Wyatt; Rymer, XII, 618.

[4] "Colonial Papers," July 31, October 17 and 20, 1623.

[5] *Ibid.*, October 8, 1623.

[6] *Ibid.*, June 24, 1624, 62.

dent of the Privy Council, and over fifty other lords, counsellors, aldermen of London and merchants.[1] They were given full power to do anything which the late Treasurer and Company of Virginia might have done; any six of them could give orders for the seizing of the public property of the company, sending supplies to the colony, the management of the government and the regulation of trade and traffic. They were to continue in power during the king's pleasure, and were to take charge of the seal and all records and books of the company. This committee met every Thursday at Sir Thomas Smith's house.[2] Most of the business of the colony passed over into its charge, although the Privy Council continued to be consulted on important matters.[3]

The appointment of a standing committee in the Privy Council with such powers and instructions clearly indicates that the king was determined not to allow the colony again to pass from his control. The affairs of the late Virginia Company had not, however, been definitely settled as yet, and there were many persons who were still petitioning for its re-establishment.[4] It was especially to investigate the claims of these petitioners and to consider ways and means for the management of the colony, that the king, in 1631, appointed a new commission, consisting of the Earls Dorset and Danby and twenty-one others, and with powers very similar to those of the commission of 1623. The commissioners were especially instructed, however, after having gathered all the information possible, to submit their conclusions to the king in the form of specific propositions for the government of the colony.[5] They

[1] The commission is given in Hazard, I, 183.

[2] "State Papers," Colonial, July 3, 1624, 64.

[3] "Colonial Papers," July 18, 26, 31, November 28, December 13, 1624; February 23, April, 1625.

[4] *Ibid.*, April, 1625; August 14, 1633; May, 1637.

[5] *Ibid.*, May 24, 1631. The Commission is printed in full in Hazard, I, 312.

were authorized also to take cognizance of the petitions and appeals from the judgment of the courts in Virginia.[1] After many "serious consultations" a report was made on the first of November, 1631, recommending that the charter be renewed, providing for a council in London and a governor and council in Virginia, both of which the king should appoint, and that the Virginia Company be re-incorporated and all its powers, rights and privileges respected.[2] This report, however, was not adopted, the chief consideration against it being that the Virginia Company had previously spent most of its time "in invections one against another."[3]

Up to this time the Privy Council had been the real directive and controlling authority, the commissions appointed having had, for the most part, only power to advise and recommend. But in 1635 the English statesmen began to take a more comprehensive view of colonial affairs. A permanent governing board was now appointed, having jurisdiction over all the settlements in America, to which was entrusted full power to revoke charters, enact laws and establish courts. This commission included many of the highest officers of state. At its head was William Laud, Archbishop of Canterbury. Among its members were the Lord Keeper, the Archbishop of York, the Lord High Treasurer and eight other high officials of state. Its instructions practically gave it the sovereign powers of "making laws and orders for the government of the English colonies; of imposing penalties and punishments for ecclesiastical offences; of removing governors and requiring an account of their government; of appointing judges and magistrates and establishing courts; of hearing and determining upon all manner of complaints from the colonies; of judging of the validity of all charters and patents, and of revoking all those unduely or surreptitiously obtained."[4]

[1] "Colonial Papers," August 20, 1631.
[2] *Ibid*, November, 1631.
[3] *Ibid*.
[4] *Ibid*, 1635.

The immediate object of the creation of this commission was to check the growth of Puritanism, which had been greatly fostered in the colonies by the increased immigration of non-conformists from England during the reign of Charles I. It was the policy of that sovereign, backed by such men as Laud and Strafford, to subject the entire realm to the immediate surveillance and dictation of the king. By placing the entire colonial department under the jurisdiction of one body with power to abolish or change at will any existing institution, it made possible an obnoxious and arbitrary interference with every detail of colonial business. It was intended that the executive in the colonies should be made to conform to English principles and be subject to direct control from England. This was already true of Virginia and Maryland, as we have seen, but not of Massachusetts. It was the purpose of the commission to destroy the Massachusetts system and set up an uniform method of administration throughout the colonies.

The commissioners at once set about putting these principles into operation by setting up a governor-in-chief over all the New England plantations. New England was divided into twelve provinces, a council of ten appointed for each, and Sir Ferdinando Gorges made governor general, and Captain John Mason vice-admiral over the entire region.[1] This project, however, like many other colonial dreams, was doomed to failure. Owing to the mismanagement of the commissioners and the determined opposition of the colonies it was never put into practice.[2] On this occasion, as on similar occasions subsequently, the General Court of Massachusetts refused to admit of any change in their system of government. In that colony the public policy was shaped not by the governor as in Vir-

[1] Winthrop, I, 192, 276, 269; "Colonial Papers," June 22, October 1, November 26, 1635; July 23, 1637.

[2] Chalmers, 162.

ginia and Maryland, but by the Assembly of the freemen.[1] The colonists desired to keep their chief executive independent of all authority in England, because they saw that by that method alone could their own supremacy be maintained. When a demand was made for their charter the court answered that they did not wish to surrender it because they would "be obliged to receive such a governor and such orders as should be sent" to them.[2]

The result of this opposition to the plan of the commissioners was a quo warranto proceeding against the charter, which was only staid from execution by political complications in England.[3] In other words, the commission of 1634, the object of which was to establish a uniform and centralized system of administration throughout the colonies under the direction of the king's officers, failed to accomplish its purpose because of the king's inability to maintain his independent position in England. The New England system was thus given a new lease of life.

Though this project had failed the commissioners continued to transact colonial business along with sub-committees of the Privy Council until the outbreak of the civil war.[4] In 1643 Parliament, having gained supremacy in England, assumed the administration of the colonies and appointed a new board of commissioners, at the head of

[1] The demand for the surrender of the charter was first made to the governor and magistrates, who replied "that it could not be done but by a General Court, which was to be holden in September next." Winthrop, I, 163.

[2] *Ibid.*, 323, 329. The answer and petition of the court are given in full in Hubbard, "History of New England," 268.

[3] Proceedings were carried on against the governor and corporation of Massachusetts Bay in the Court of King's Bench from Trinity term, 1635, to Easter term, 1636, ending in a judgment against the corporation and an order from the Privy Council requiring the attorney general to call in the charter. "Colonial Papers," May, 1637. The letter from the commissioners, citing these proceedings and demanding the charter, may be found in Hubbard, 268.

[4] "Colonial Papers," July 15 and 27, 1638; July 30, August 10, 1639.

which was the Earl of Warwick, with the title Governor-in-Chief and Lord High Admiral of all the Colonies in America.[1] In granting power to this board no departure was made from the earlier custom. It was instructed to "provide for, order and dispose of all things which it should from time to time find most fitt to the well-governing of the said plantations." This grant included the power of appointing, instructing and removing all governors, councillors and other officers. The colonies were ordered not to receive or recognize any commander or agent but such as had been approved by these commissioners. Under this authority Warwick and his associates issued patents for lands, provided for the maintenance of religion, appointed governors and regulated trade.[2] This arrangement continued until the establishment of the Commonwealth in England, when the Privy Council was replaced by the Council of State appointed by Parliament, February 13, 1649.[3] From this time down to the Restoration colonial business passed through the hands of this council, or its "committee for America,"[4] or the commissioners of admiralty,[5] subject at all times to the instructions and orders of Parliament itself.[6]

The relations between England and the colonies of Virginia and Maryland during the Commonwealth period have been referred to in describing the changes in the executive office at that time.[7] In Massachusetts no change was made on this account, but the relations between the colony and Parliament became interesting and significant. On

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[1] Hazard, I, 533; Chalmers, 175.

[2] "Colonial Papers," November 24, 1643; December 10, 1643; March 14, October 23, 1644; December 11, 1646.

[3] Gardiner: "Documents of the Puritan Revolution," 261.

[4] "Colonial Papers," August 13, December 1, 1657.

[5] *Ibid.*, April 17, October 19, 1650.

[6] For the acts of Parliament respecting the colonies between 1640 and 1656, see Hazard, I, 633.

[7] See *ante*, 27, 50.

the outbreak of the civil war the General Court, being popular in its sympathies, at once recognized Parliament and threw its influence on the side of that body.[1] Nevertheless, when Parliament had won its battle the General Court refused to admit appeals to it, on the ground that their charter, in conferring the right to correct, punish, pardon, rule and govern, implied a "perfection of parts" and a "self-sufficiency not requiring any other power in the way of a general governor to complete the government."[2] They defined their allegiance as similar to that of the Hanse towns to the Empire, or Normandy and Gascony to France, where there was no dependence in point of government. They refused to accept a new charter from Parliament in 1646, or from Cromwell in 1655, because it would mean a surrender of their old one.

When, however, the appeals of Samuel Gordon and William Vassel brought the question of jurisdiction of Parliament to a direct issue, the General Court, while protesting, found it convenient to recognize the authority of Warwick and his associates and to obey their orders.[3]

This is as far as Parliament went in asserting its power over the colony. In 1647, after an explanation of the state of the case by Mr. Winslow, the colony's agent in England, the commissioners declared that they did not intend by their former action to encourage appeals or restrict the jurisdiction of the colony.[4] After the establishment of the Commonwealth, Cromwell, even while urging the colony to accept a new charter, did not attempt to interfere in domestic affairs or molest the form of government.[5]

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[1] "Records," II, 69.

[2] Winthrop, II, 341.

[3] *Ibid.*, 345; "Records," II, 242. For the Gordon Case, see "Records," II, 51; Winthrop, II, 171, 319.

[4] Winthrop, II, 389. The commissioners declared their intention thus: "To leave you with all that freedom and latitude that may in any respect be duely claimed by you."

[5] Barry, I, 344. It is probable that Cromwell interfered in Parliament in behalf of the colony. There is no positive evidence of

## CHAPTER IV.

## THE RELATIONS OF THE EXECUTIVE TO THE LEGISLATIVE ASSEMBLIES.

Institutionally, the governor may be regarded as the intermediary link between the colonial legislatures and the English government. Drawing his authority from the latter he was instructed, or at least empowered, to use it to check, direct, or dispense with the former, which were purely popular bodies representative solely of colonial interests. In the charters themselves there was little or no protection of the colonists against executive powers when exercised by the corporation or proprietor to whom they had been granted. In Lord Baltimore's charter for Maryland there was the provision requiring the assent of the freemen to the enacting of laws. In Massachusetts, though there was no such provision in the charter, the same advantage was more firmly secured by the removal of the corporation to the colony and its expansion of the latter into a self-governing state. In Virginia there was no such limitation until the Assembly was constituted in 1619. These fundamental limitations were not sufficient in the eyes of the colonists. There soon grew up a strong popular opposition to the political prerogative of the executive; to the manner in which it was exercised, as well as to the mere fact that power was so concentrated that it might be exercised to the disadvantage of the colonists. This opposition gradually succeeded in securing an independent field of jurisdiction for the popular legislatures and in reducing

this, but it appears from a letter of his to Colton and in his proposals to remove the colony to Jamaica.

the scope of power of the executive by securing recognition to acts making certain definite limitations on his prerogative.

The exact character of these relations between governor and Assembly in the seventeenth century is a subject concerning which there still exists some confusion. Thus it is claimed that down to 1688 the people held fast to their liberties and were not in general disturbed in their assemblies, but that, beginning with the English Revolution, a system of executive tyranny began to be enforced,[1] commercial oppression was more rigidly applied and the governors attempted to overthrow colonial liberties by interfering with rights and privileges of the assemblies, which resulted in what is commonly referred to as the eighteenth century bickerings between Assembly and governor.[2] But it is an error to regard these disputes as beginning with the Revolution or as especially characterizing the eighteenth century. The contest began as soon as the colonies had grown to sufficient size to make the method of their government a matter of importance. It was occasioned by two conditions common to the colonists from the first. In the first place, the location of the colonies in a new country, far away from any strong government which could exercise authority over them, fostered the growth among the planters of that natural feeling of resentment toward any external authority, and of that desire to have a controlling hand in their own government which always characterizes pioneers who advance beyond the bounds of civilization into a new and unexplored country.

But, in the second place, there was also a more vital reason for the antagonism. There is evidence that the colonists recognized in the governors the representatives, direct or indirect, of that absolute personal rule which they had

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[1] Landon: "Constitutional History," 24.
[2] Thwaites: "The Colonies, 1492–1750," 271–3.

known in England; that they claimed the right to limit this rule by means of popular assemblies "after the manner of Parliament;" and that in this way they continued on this side of the Atlantic the contest for popular government which was being waged on the other side of the sea. The colonists were familiar with the great parliamentary struggle then going on in England. Their demands show that the issues were for the most part the same as those which were being fought for in the mother country. The right to be taxed only with their own consent; the right to have assemblies called at regular and fixed intervals, and dissolved or interrupted only at their own consent; the right to be ruled, not arbitrarily, but according to laws made by themselves or the known and established usage of England, were points on which the popular assemblies began to insist almost from their first meeting. They were given greater emphasis when those assemblies imitated the example of parliamentary supremacy after the execution of Charles I, and after the Restoration of 1660 they were demanded with constantly increasing vigor and firmness.

In Virginia, almost as soon as the legislative Assembly had been organized, it began to assume control of the budget. The first known act imposing a definite limitation on the governor was that of 1624, to prohibit the levying of any tax or impost on land or commodities without the consent of the Assembly, and providing that such a tax when collected should be expended only as appropriated by the house. Another act, passed at the same time, forbade the governor to force any person from private labor for his own or public service.[1] This power had previously been exercised by the governors in an offensive and arbitrary manner for building forts and public houses.[2] The important limitations thus placed upon the executive were later insisted

[1] Henning, I, 124.

[2] Chalmers, 66, 77.

upon by the burgesses, the laws being re-enacted successively in 1631, 1632 and 1642.[1]

The sessions of the Assembly were not regular for some years after 1624. There seems to have been no further attempt to restrict the governor until the administration of Sir John Harvey in 1635. Before examining the relations between this governor and the Assembly, however, a word must be said as to his personal character, which was not such as to make him popular among a free people. By contemporary historians he is described as extortionate, unjust and arbitrary; issuing proclamations without regard to the legislative rights of the Assembly, disbursing colonial revenues on his own authority, and appropriating fines to his own use. Of his personal address it is said that he was "so haughty and furious to his council and the best gentlemen of the country that his tyranny at last grew unsupportable."[2] In addition to this, it was urged that Harvey was a thorough-going courtier who prized the favor of his partisans and patrons in England more highly than the welfare of the people he was sent to govern.[3]

The first occasion of disturbance between this governor and the Assembly arose in connection with the perplexing intrigues of Claiborne. This man, a Virginia colonist, armed with a patent from the king, had established a trading post on Kent Island, in the Chesapeake Bay, within the jurisdiction of Maryland. Having refused to submit to the authority of Baltimore, he was attacked by the latter's officers and, with the active assistance of Governor Harvey of Virginia, sent as a prisoner to be tried in England. The legal right in the matter seems to have been on the side of Lord Baltimore, though there was much confusion over the subject. The king had ordered Baltimore not to disturb the inhabitants of Kent Island; the Privy Council had decided that Baltimore must be protected in his charter rights.[4]

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[1] Henning, I, 171, 196, 244.
[2] Cooke: "Virginia," 165.
[3] Bancroft, I, 137.
[4] Winsor, III, 527.

Apparently, however, Harvey's action was not determined by the justice of the question but by the desire to gain the good-will of Baltimore and through him of the entire court party.[1] For his "service" he gained the much-prized thanks of Baltimore, was commended by the king for his "very acceptable" service, and received a note from the secretary of the Privy Council complimenting his "dutiful obedience to his sovereign's commands."[2] This conduct was regarded by the colonists of Virginia in the worst possible light and won for the governor almost universal disfavor. It was not long before another opportunity was given for this discontent to break out in open revolt. In 1634 the king had granted a commission to Thomas Young to conduct an exploring party into the uninhabited parts of Virginia.[3] While executing this commission Young had occasion to employ a ship's carpenter for repairs in Virginia. Trouble arose in settling with the workmen; the case was carried before Governor Harvey and was decided in favor of the king's deputy and against the Virginian.[4] This was too much for the colonists. A meeting of the council was held, the Assembly was summoned, and Harvey was deposed and sent to England for trial on the charge of treason.

Governor Harvey was charged with having usurped power in four ways: by acting without the assent of the council; by illegally restraining the trade with Maryland; by concluding a treaty of peace with the Indians, and by instigating the Marylanders to rise against the inhabitants of Kent Island.[5] Doubtless he was guilty, in spirit at least, of all these charges, yet it is impossible not to recognize here an attempt on the part of the Assembly to

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[1] Eggleston, 249.

[2] "Colonial Papers," September 15, 18, 29, 1634.

[3] *Ibid.*, September 23, 1634.

[4] *Ibid.*, July 10, 1634.

[5] Matthews to Wolstenholm, "Colonial Papers," May 25, 1635, 208.

invade the domain of legitimate executive functions. Two of the acts charged against the governor, those regarding trade and the relations with the Indians, were especially sanctioned by his commission.[1] To charge that he was exceeding his power in performing them indicates the advance on the part of the Assembly to a new position.

It is interesting to compare the charges against Harvey with those brought against Winthrop by the General Court of Massachusetts.[2] In each case there was jealousy on the part of the popular party of the power centralized in the hands of the executive and an attempt to invade it. In both Massachusetts and Virginia, behind the personal element in the struggle, there was the contest between two theories of government. Without doubt the religious differences and the unsavory character of Governor Harvey were factors in the dispute, but this does not lessen the significance of the case. Governor Harvey himself charged the disturbance to certain letters of Sir John Wolstenholm advocating a reorganization of the Virginia Company and to the mutinous conduct of John Pott, because he, Pott, had been superseded in the government by Harvey.[3] But, as was to be expected, regardless of the merits of the case, the governor was vindicated by the king. Harvey was the "king's officer," appointed and commissioned by the royal command, and the king could not permit him to be "thrust out" by the burgesses of a plantation. He was recommissioned governor with the same powers as before, at the request, it is said, of Lord Baltimore,[4] and sent back to the colony in one of the king's private vessels,[5] while, on the other hand, five of his accusers were sent to England for trial, and one, at least, was for some time imprisoned in the Fleet.[6]

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[1] Rymer's "Foedera," Tome 20, 3; see also 14, 18, above.
[2] See above, 37.
[3] "Colonial Papers," July, 1635, 212. [4] Bancroft, I, 137.
[5] "Colonial Papers," February 15, 1635; April 2, May 17, 1636.
[6] *Ibid.*, December 22, 1635.

After this triumph of the executive there was no open strife between the two branches of the government for some years. Harvey continued governor until 1639 when he was replaced by Sir William Berkeley. This officer, important in the history of the colony before as well as after the Restoration, was a thorough royalist courtier. He was descended from a family which had figured prominently in English nobility since the Conquest. His brother was ambassador to Sweden under Charles I, and Sir William himself had been one of the gentlemen of the privy chamber to that sovereign. Though his haughty pride and intolerance drove many of the best inhabitants from the colony, as a law-giver and administrator he was prudent, just and diligent. He was the author of most of the best laws of the colony.

During the struggle between king and Parliament in England, the royalist party in Virginia, led by Governor Berkeley, seemed to represent the entire interests of the colony. As soon, however, as the commissioners of Parliament had assumed control of the colony, in 1650, and opportunity was given for an expression of popular will,[1] it was found that a majority of the inhabitants were not averse to parliamentary supremacy. This popular party was raised to power by the commissioners and an agreement made with them which was so favorable to the colonists that it has been likened to a compact between equals.[2] But the relation between the two branches of the government was now reversed. The executive which before had been independent and supreme, was made entirely subordinate to, and dependent on the Assembly. The right and power of electing and removing all executive officers, including governor and council, was transferred to the legislative body. By this simple act the Assembly became the paramount organ of the government and remained so during the Commonwealth period.[3]

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[1] See above, 27. [2] Henning, I, 497, 499. [3] *Ibid.*, 503, 530.

It was the desire of the governor to regain the independence thus lost that led to the significant contest for sovereignty within the colony which occurred in 1658. In March of that year, before the Assembly had adjourned, the governor and council declared it dissolved and issued an order to the speaker to dismiss the burgesses.[1] The Assembly immediately answered this manifesto by a declaration that the action of the governor was unlawful and demanded that his order be revoked. This demand of the house was allowed by the governor, who, however, proposed to refer to the Lord Protector of England the question as to the legality of the course he had taken. This brought the whole matter to an issue at once. For the colonists saw, as the colonists of Massachusetts had seen, that the reference of such questions to England for decision must in the end be inimical to their privileges. The burgesses accordingly passed a resolution declaring that they were not dissoluble by any power in Virginia but their own. To demonstrate their supremacy they deposed the governor and council and then re-elected them. They sent an order to the sheriff of James county and the sergeant-at-arms of the house, requiring them not to execute any warrant, order or command unless signed by the speaker of the house. The governor was compelled to submit and the triumph of the legislature over the executive was for the time being complete. It was, however, of short duration, for at the Restoration the control of the executive passed again to the Privy Council and its former supremacy was re-established.

In studying the relations between the governor and the General Court in New England, consideration must be taken of the fact that the two departments there rested on the same basis; in other words, were co-ordinate; a fact which is not true of either Virginia or Maryland. In the two colonies last mentioned the executive officers were

[1] Henning, I, 497, 499.

appointed and commissioned in England, while the legislative assemblies, not being provided for in the charters,[1] were organized and controlled by the governor. In Massachusetts, on the other hand, Assembly and governor were both appointed by and responsible to the same source, the colonists; and the Assembly had in theory, through the expansion of the company into the commonwealth, as complete a constitution in the charter as the executive department. This relation of the two departments in Massachusetts affected very materially the position they assumed in the colony.

The details of the early relations between governor and General Court in Massachusetts are obscure. Only enough is known to determine the general character of a sharp contest in which the governor and council strove to maintain their position against the aggressions of the popular body. The first governor represented to considerable extent the idea of centralized power. He was chosen by the council; he could call meetings of the General Court in which he had a seat and over the actions of which he had virtual control; and with his council he could levy taxes, make and enforce laws.[2] Very soon, however, the freemen began to grow jealous of this power and encroached upon it. Their first move was in 1632 when it was enacted by the General Court that the governor should be elected by the whole body of freemen.[3] Two years later the law making and taxing power was assumed exclusively by the General Court, with the provision that that body could not be dissolved without its own consent.[4] In 1639 the independence of the court was still further assured by an act enabling it to meet at regular intervals, even should the governor fail to issue the summons. Only once, in 1645, did a governor attempt to exercise the power of dissolving the

[1] The charter for Maryland required the assent of the freemen in legislation, but provided no means for ascertaining that assent.

[2] "Records of Massachusetts Bay," I, 79.

[3] "Records," I, 95.

[4] *Ibid.*, 118.

General Court, and he was then defeated, the court simply refusing to obey and the governor having no means to enforce his command.[1]

The question as to the part which the governor and council should play in the deliberations of the General Court was a prolific source of dispute. It does not appear that the governor personally ever possessed a veto on the acts of the court. His power in that body during the early years of the colony was due to the personal influence which he, as the most important officer in the colony, surrounded and supported by the smaller court or council of assistants, by whom he was then elected, could assert over the irregular and unorganized body of freemen. But after it had become lawful for the freemen to send deputies to represent them at the General Court, it was enacted that, while the magistrates and deputies should continue to sit together in one body, every law must receive the assent of magistrates and deputies separately.[2] This was in 1636. In 1641 the governor was given a casting vote in case of a tie in the General Court.[3] This was doubtless to obviate the difficulty arising from the system of arbitration provided in the law of 1636 for cases of disagreement between the deputies and magistrates.[4] When, however, the deputies and magistrates were organized into separate houses, an absolute equality as regards legislative power was established between them.

Thus after possessing an almost complete control over the meetings of the court and the making of laws, the governor and his council were restricted on the legislative side to the functions of one co-ordinate member of the law-

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[1] "Records," III, 27.

[2] *Ibid.*, I, 170.

[3] "Laws, D. P. and S.," 90.

[4] And for want of such accord the cause shall be suspended; and if either party think it so material, there shall be forthwith a committee chosen to elect an umpire, who together shall have power to hear and determine the cause in question. "Records," I, 170.

making body with no control whatever over the other. Even this position was threatened in 1645 by the appointment of a committee to consider some way by which the negative vote exercised by the magistrates might be tempered; and in 1641 the judicial prerogative of the governor was intrenched upon by the passage of an act which transferred the pardoning power to the General Court.[1]

These changes had not been admitted without a struggle. There was an almost constant friction between the magistrates and the more democratically inclined of the colonists. In 1632 Governor Winthrop was formally charged with having exceeded the limits of his power, which, it was held, was not different from that of any of the assistants, except in that he could call meetings of the General Court. Winthrop, on the other hand, contended that the office of governor entitled him to all the powers and privileges that belonged to a governor according to the common law or had been conferred by statute.[2] His accuser cited seven cases in which he was charged with exceeding his authority, the chief of which were: removing the ordnance and erecting a fort at Boston; illegally granting licenses for trade and settlement; attempting to alter sentences passed by the court.[3] These charges were all admitted and explained, or refuted to the satisfaction of the court, and the matter allowed to drop.

Jealousy between the two branches continued, however, and became even more pronounced after the separation of the General Court into two houses.[4] In 1644 an act was passed by the lower house, the object of which was to practically destroy the influence of the governor and the result

[1] "Records," III, 11.

[2] Winthrop: "History of New England," I, 99.

[3] *Ibid.*, 102.

[4] When the question of sending deputies to the court was first proposed, Winthrop treated the question as in his power to settle; he proposed that, at the court's order, he would call meetings of deputies to revise the old laws, but that they could not make new laws. *Ibid.*, 153.

of which would have been to seriously cripple the executive power by placing it in commission. It provided for the appointment of seven magistrates and three deputies, who were to have full charge of the government of the colony during the intervals between the sessions of the General Court.[1] The upper house rejected this measure on the ground that it tended to overthrow the foundation of the colonial government.[2] At the next session of the court the matter was referred to the elders for decision. They naturally took sides with the magisterial body, and the result was a complete vindication of the governor's position.[3]

The next year, 1645, a dispute of greater import arose regarding the magistrate's authority. The magistrates undertook to interfere in a local dispute over a contested election and to settle the matter temporarily pending the next meeting of the court.[4] The right to do this was hotly denied; some of the inhabitants asserted that they would die at the sword's point if they had not the right freely to choose their own officers.[5] This incident gave occasion for a general outburst of indignation and discontent at the magisterial system of administration, Winthrop, the deputy governor, being especially obnoxious to the extreme demo-

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[1] Winthrop, II, 205.

[2] The magistrates contended that only the freemen in Court of Election had the right to create general officers; and that in the commission, four of the magistrates were not mentioned. The deputies held that the governor and assistants had no power out of court but what was given by the court; the magistrates answered that they had powers of government before they had any written laws or had kept court, and that *"to make a man governor over a people, gives him by necessary consequence the power to govern that people;"* they held that they were a standing council by election and hence empowered to act in absence of the court. The deputies then changed the object of the committee, limiting it to war powers alone, and included in it the rest of the magistrates. But the latter refused to recognize any committee whatever. *Ibid.*, 205, 206.

[3] *Ibid.*, 251. "Records," II, 91.

[4] Winthrop, II, 271.

[5] *Ibid.*, 272.

cratic party.[1] But at a hearing in the General Court he was cleared of the charges brought against him. In his speech before the court he stated clearly the basis on which he thought the magisterial power rested: "The great questions that have troubled this country are about the authority of the magistrates and the liberty of the people. It is you who have called us to this office, and being called by you we have our authority from God in way of an ordinance." [2] But though Winthrop was vindicated of the charges brought against him, the soil of America proved as inhospitable to his theories of divine right and his theocratic tendencies as it did later to the attempts to transplant hither the feudal system. Both institutions belonged to the old world and could not thrive in a region where old world ideas and traditions had never penetrated. The magistrates in Massachusetts were compelled to submit to hold and exercise their office at the will of the people, not the will of God.

Turning to Maryland we find the question of initiative of legislation the first point of encroachment attempted by the freemen upon the prerogatives of the governor. The first

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[1] Winthrop, II, 277, 275. Winthrop was not specifically charged, but being plainly the one aimed at, he refused to sit in his official place until he had been cleared of all suspicion.

[2] *Ibid*, 280. Continuing, he said that magistrates were subject to the same passions as other men, and advised all to exercise more forbearance. There seems to have been a general feeling and fear that the magistrate intended to set up an arbitrary government of unlimited powers. Perhaps this was not without some real foundation. The governors tried to assume some degree of dignity and state, and were attended on public occasions by sergeants bearing halberds. In 1637 these sergeants refused to perform this task longer, saying that they had done it voluntarily and out of respect to the person of the governor, not his office. The governor replied that "the place drowns the person," and that an honor once conferred on the office cannot be withdrawn without contempt and injury. Some of the towns offered to furnish men to bear the halberds, but the governor refused and assigned the duty to two of his own servants. Winthrop, I, 268.

governor's commission of 1637 provided for the summoning of an Assembly. To this body the governor was instructed to submit for approval certain laws transmitted with the commission. There is nothing in this which would prevent the freemen from adopting laws of their own making also and sending them to the proprietor for his approval. The freemen themselves so understood it; and they proceeded to prepare a number of new acts instead of adopting those submitted by the governor. But the governor's commission had further provided that after the dissolution of this first Assembly, the governor might at his discretion call other assemblies for the purpose of preparing laws.[1] And Governor Calvert interpreted this distinction to signify that it was not the province of the first Assembly to pass any acts except those submitted by the proprietor. Acting upon this idea he attempted to prevent the freemen from carrying out their intention. The latter, however, persisted. They carefully examined the commission, appointed a committee to prepare their acts, and refused to pass those submitted by the proprietor.[2] It was doubtless Baltimore's intention to have a precedent made in favor of his own right to initiate legislation and to have a body of laws of his own making adopted before the colonists could take action.[3] The freemen felt that it threatened their right to submit bills, and therefore opposed it at once with all their might. The incident is significant as the first step in that long and jealous contention between the Assembly and the executive on matters of legislation. The strife begun here continued throughout the century.[4]

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[1] Commission to Governor Calvert, "Archives," Council, 51. The first authentic meeting of the Assembly was in 1637. There was a meeting of the freemen in 1634, but almost nothing is known as to its object or proceedings. Chalmers: "Annals," 210.

[2] "Archives," Assembly, 10, 11, 20.

[3] In the commission it is stated that all laws made previously are to be void. This refers to some acts passed in 1634.

[4] "Archives," Assembly, 239, 264; Council, 219.

It soon became the object of the freemen to secure for their Assembly complete independence of executive control. By his commission the governor was given the prerogative of summoning and adjourning the Assembly at his discretion. In 1640 he exercised this right by proroguing the Assembly from one year to the next, thus preventing yearly election of deputies. It was on this point that the freemen made their most determined attack. They began at the next Assembly after the above event by enacting a law that the house of Assembly should not be adjourned or prorogued but by its own consent. They then appointed a time for their next session.[1] But the governor, being commissioned by a sovereign power outside the colony, unlike the governor of Massachusetts, could not be affected by such acts. He continued to possess and exercise full control over the meetings of the Assembly as well as the number of burgesses entitled to sit in it. After the Restoration this prerogative continued to be one of the chief grievances of the colonists and repeated attempts were made to abolish or limit it.[2] But though numerous laws were passed fixing regular sessions and the number of burgesses to be sent from each locality, the proprietor refused to confirm any of them.[3]

In 1647 the Assembly declared certain laws illegal because not passed by a competent authority. The governor insisted that the body which passed them was competent and proclaimed that he would uphold them.[4] On the other

[1] "Archives," Assembly, 117, 121, 131.

[2] *Ibid.*, I, 259; III, 60, 416, 450, 463, 486.

[3] In 1678 on one of these occasions, Baltimore declared himself: "Resolved, never to part with those my charter gives me."

[4] Letter of the Assembly to the proprietor, "Archives," Assembly, 238, 264. The colonists here claim that the Assembly in which the laws were passed was called by Hill, who pretended to be governor but who had no commission; that this Assembly was continued by Leonard Calvert without issuing of new summons; that Calvert imprisoned all those who had rebelled against him, and that among this number were the "whole House of Commons," two or three

hand, the Assembly, in 1649, refused to assent to a number of acts proposed and transmitted by the proprietor. This aroused the indignation of Lord Baltimore and called from him a reprimand in which he vigorously resented the presumption of the freemen and asserted his claim to royal jurisdiction similar to that of the Bishop of Durham: "We are satisfied by learned counsel here that the Bishop of Durham before Henry VIII had and exercised all royal jurisdiction within the said bishopric or county palatine." [1]

The efforts of the freemen to establish their liberty were, however, successful at last, and in 1650 important limitations were made on the extraordinary power of the executive. A law was passed and assented to by the proprietor, providing that no tax of any kind whatsoever should be laid on the colonists without their consent.[2] The war power of the governor was curtailed by the provision that freemen should not be compelled to engage in or support any war outside the limits of the province, and that martial law should be declared only in time of war or insurrection and then only within the camp or garrison.[3] And though these acts were, in accordance with the usual custom at first enacted for only a limited term of years, they were repeatedly confirmed and in 1676 re-enacted as "perpetual" laws.[4]

There can be no doubt but that Lord Baltimore had at heart the welfare of his province, but at the same time that he did all in his power to advance its interests, he was always careful to see that his own rights and prerogatives were not jeopardized. He was ever on the alert to resent

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only excepted. The next Assembly after that called by Hill made a protest against the laws, signed by nearly every member. The letter of the Assembly and the answer of Baltimore furnish excellent illustrations of the jealousy and distrust existing.

[1] "Archives," Assembly, 264. [2] *Ibid.*, I, 302.

[3] *Ibid.*, 302.

[4] Chalmers, 219, says that "the year 1650 is memorable in the history of Maryland for the final establishment of that Constitution which has continued to the present time."

any act which might detract from his titles or jurisdiction. When the freemen passed a resolution recognizing and confirming the rights and title of the proprietor to the province, Baltimore replied with spirit that his right was not in need of any confirmation by the Assembly, yet he was surprised that any freeman should have voted against such an act.[1] He rejected the laws passed by Governor Green because the oath had not been taken "without exception" in precisely the language stipulated.[2] It should not, however, be concluded that these acts were the result of any petty desire of the proprietor to tyrannize over the province. They were rather due to the fact that Baltimore was a courtier, under the influence of English royal ideas, dominated by English principles of jurisprudence and administration, and accustomed to the exercise of the prerogative. Under these circumstances it was not only natural but inevitable that he should desire to uphold his prerogative and assert his system of administration in the colony. His jealousy of anything that detracted from his rights and titles, his absolute refusal to grant a permanent and definite constitution for the Assembly, are only evidences of a wide difference between his conception of a province and provincial administration and the freemen's conception of a colony and colonial institutions.

This difference will explain the ease with which the revolution of 1659-60 was accomplished by the freemen and the promptness with which it was suppressed by the proprietor. The occasion of this disturbance was no doubt the unsettled state of affairs in Maryland during the Commonwealth period and the popular revolution in Virginia in 1652.[3] Taking advantage of this example and opportunity the burgesses, in 1658-59, rapidly put into execution a plan to change the province into a commonwealth in which the voice of the representatives of the freemen rather

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[1] "Archives," Assembly, I, 265. [2] *Ibid.*, 313.
[3] See above, 69.

than the deputy of the proprietor, should be paramount.[1] The House of Burgesses declared that it was not dependent upon any other power whatsoever, and refused to permit the governor and council to sit as an upper house. The executive was made dependent upon the Assembly by the governor's surrender of his commission and his acceptance of a new one issued by the Assembly.

Governor Fendall gave up his position as governor and consented to sit in the House of Burgesses in conjunction with the speaker, with a double or casting vote as representing the proprietor.[2] Thus by an almost spontaneous assertion of power the administration of the colony was entirely changed. There seems to be some doubt among historians as to the character of Fendall, and as to whether the trouble was incited by him or arose from patriotic motives among the burgesses.[3] Whichever view may be correct, the fact remains that the movement received a strong popular support. It shows how evident was the opposition to the proprietary system of administration. Though the movement was promptly checked by Baltimore and the former system re-established with the assistance of the king at the Restoration, it is proof that the colonists were ready to seize the first favorable opportunity to assert their independence and reduce the executive to a position of secondary importance.

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[1] "Archives," Council, 387. [2] "Archives," Assembly, I, 388, 390.

[3] Fendall, though appointed by the proprietor, was a colonist who had previously been engaged in opposition to the proprietor's authority. Bancroft, I, 263; McMahon, 212. The action of Fendall in consenting to sit in the House of Burgesses and accepting a new commission from them, goes to support McMahon's views.

## SUMMARY.

The facts set forth in the foregoing pages, if they have been correctly interpreted, lead to the following conclusions:

1. The governments projected in the colonial charters were executive in form, the Lord Governor and his subordinates being entrusted with the administration of all the powers exercisable in the colonies.

2. With one exception there was no attempt, during this period, to guarantee by charter the political rights of the colonists by providing for them a share in the government.

3. Popular opposition to this system arose as soon as the colonies were founded and did not begin with the Revolution of 1688 or particularly characterize the eighteenth century.

4. Through the enormous grants of territory and jurisdiction made to the trading companies the latter tended to become independent. Partly to check this tendency, partly because of the popular or democratic development in the colonies, the English government began the attempt to centralize the government of the colonies. This policy did not originate after the Restoration.

5. But in spite of this policy the popular movement had succeeded, prior to 1660, in considerably reducing the power of the executive officers by placing numerous and important checks upon the exercise of their functions.

# APPENDIX.

## I.

The following list of Governors of Massachusetts is taken from Moore's "Lives of the Governors of Massachusetts."

| | | | | | |
|---|---|---|---|---|---|
| John Winthrop . . | appointed | 1630 | John Endicott . . | appointed | 1644 |
| Thomas Dudley . . | " | 1634 | Thomas Dudley . . | " | 1645 |
| John Haynes . . . | " | 1635 | John Winthrop . . | " | 1646 |
| Henry Vane . . . | " | 1636 | John Endicott . . | " | 1649 |
| John Winthrop . . | " | 1637 | Thomas Dudley . . | " | 1650 |
| Thomas Dudley . . | " | 1640 | John Endicott . . | " | 1651 |
| Richard Bellingham, | " | 1641 | Richard Bellingham, | " | 1655 |
| John Winthrop . . | " | 1642 | John Endicott . . | " | 1656 |

## II.

### Governors of Plymouth.

| | | | | | |
|---|---|---|---|---|---|
| John Carver . . . | appointed | 1620 | William Bradford . | appointed | 1637 |
| William Bradford . | " | 1621 | Thomas Prence . . | " | 1638 |
| Edw. Winslow . . | " | 1633 | William Bradford . | " | 1639 |
| Thomas Prence . . | " | 1634 | Edw. Winslow . . | " | 1644 |
| William Bradford . | " | 1635 | William Bradford . | " | 1645 |
| Edw. Winslow . . | " | 1636 | Thomas Prence . . | " | 1658 |

## III.

### Governors of Virginia, from 1606 to 1660.

| | |
|---|---|
| Sir Thomas Smith . . . . 1606–18<br>Sir Edwin Sandys . . . . 1618–24 | Treasurers of the Virginia Company of London. Elected by the company. |
| Edward M. Wingfield . . . . . | Presidents of the council in Virginia from 1606 to 1609. Appointed by the council in Virginia. |
| John Radcliff . . . . . | |
| John Smith . . . . . | |
| George Percy . . . . . | |